TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 273.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, PLAINTIFF IN ERROR,

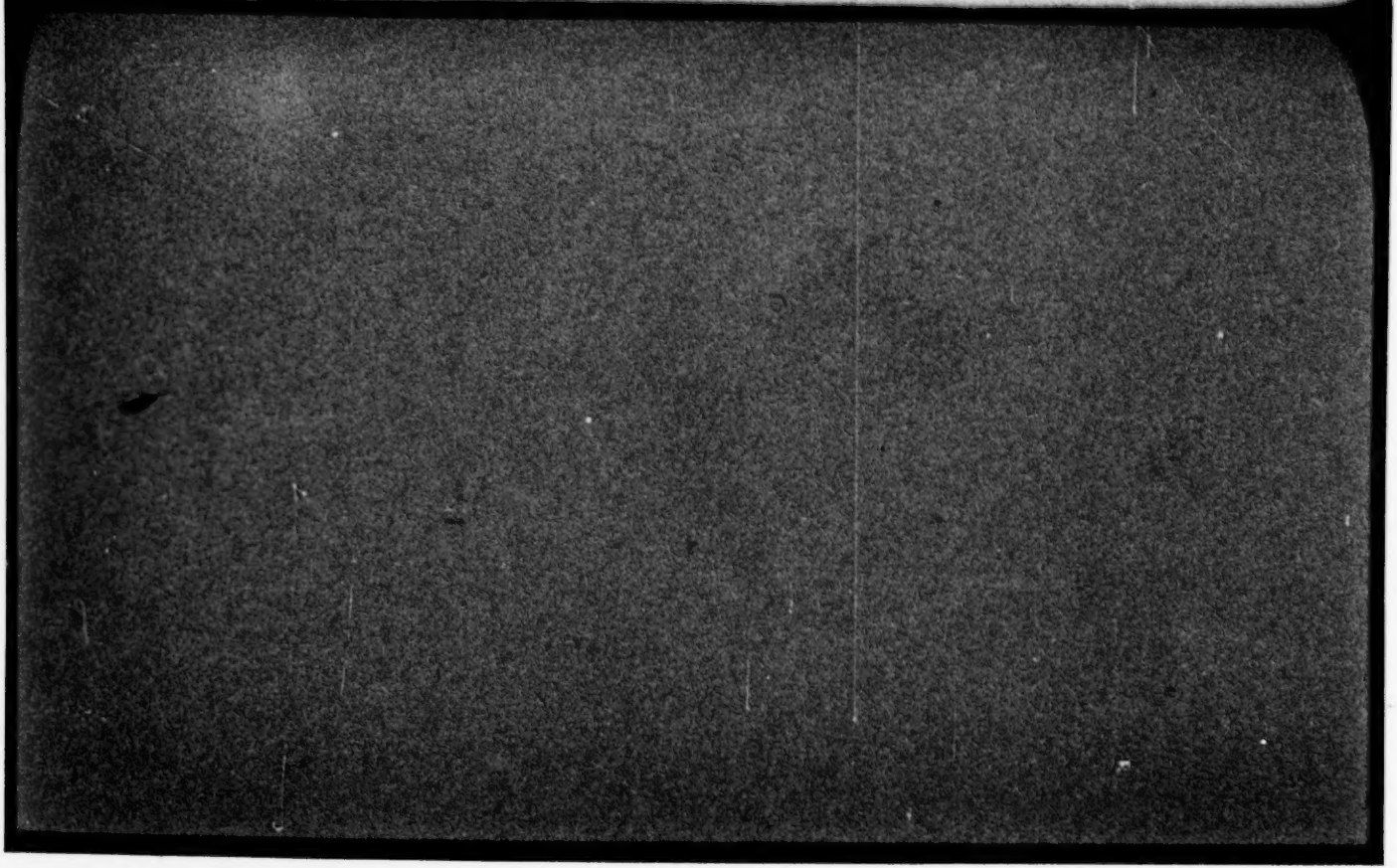
vs.

VARNVILLE FURNITURE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 19, 1914.

(22,894)



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1 STATE OF SOUTH CAROLINA:

In the Supreme Court.

Appeal from Second Circuit, Special Term, Hampton County.

VARNVILLE FURNITURE CO., Plaintiff-Respondent,
vs.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Defendant-Appellant.

2 *Statement.*

This action was brought in a Magistrate's Court for Hampton County to recover the sum of $14.75 damages done, in transit, to a shipment of furniture from High Point, N. C., to Varnville, S. C., and for $5.25 overcharge of freight. A penalty of $50.00 was asked for in the same action for failure to settle claim within the time prescribed by law. Defendant demurred to the second cause of action, or the action for a penalty, and answered the other allegations *for* the complaint by a general denial. The Magistrate rendered judgment in favor of the plaintiff for the sum of $19.35 damages and overcharge and $50.00 penalty, and the defendant appealed to the Court of Common Pleas for Hampton County. His Honor, Judge R. W. Memminger, at a Special Term of the said Court, held in December 1912, signed an order affirming the judgment of the Magistrate. From that order this appeal is taken to the Supreme Court.

Summons to Defendant.

By J. G. Murdaugh, Esq., Magistrate in and for Hampton County and for said State, whereas L. H. Carter made complaint before me that he is the manager and proprietor of the Varnville Furniture Company's business in the town of Varnville, S. C. and said State and County, and that on the first week of March 1912, ordered a car of furniture from the High Point Mfg. Company, High Point, N. C. and said furniture arrived at Varnville, S. C. on the 25th of March 1912.

2. That the Defendants Charleston & Western Carolina Ry. is a corporation duly created under the laws of South Carolina, and passes through Hampton county and said State.

3. That the Varnville Furniture Company — in said name
3 and doing business in the above named, but owned and controlled by L. H. Carter,

4. That the defendants did damage the said furniture by breakage fourteen Dollars and seventy-five cents $14.75 by wilful and gross negligence in handling said freight,

5. That the Plaintiff filed his claim on 18th of June, 1912, at

the destination with the defendants C. & W. C. Ry. and said claim has not been paid according to law, in cases of this kind, therefore demand Fifty dollars penalty,

6. That the defendant is due the plaintiff five dollars and twenty five cents for overcharge on said furniture for which this claim was filed together with the damage at the same time therefore Plaintiff Prays Judgment for Seventy $70.00 and cost of this action.

To any lawful constable:

These are therefore to require you to Summon the Defendant to appear before me in my office at Varnville, S. C. September 13th 1912, to answer the complaint and if you fail*ed* to answer 13th day, I will give Judgment by default, given under my hand and seal this 23rd day of August 1912, at Varnville, S. C.

J. G. MURDAUGH, [L. S.]
Magistrate.

Answer of Defendant.

Defendant demurs to the second cause of action in plaintiff's complaint upon the following grounds:

1. Because it appears upon the face of plaintiff's complaint that the second alleged cause of action does not state facts sufficient to constitute a cause of action, because it shows that shipment was made from High Point, N. C., to Varnville, S. C., and penalty would not apply.

J. W. MOORE,
Defendant's Attorney.

Demurrer Overruled.

Defendant then took the following possition as to statutory penalty:

(*a*) That the Act of the General Assembly of South Carolina, approved February 15th, 1910, entitled "An Act, etc. etc." is unconstitutional as applied to inter-state shipments, because it tends to regulate inter-state commerce and constitutes a direct burden on inter-state commerce.

(*b*) The penalty imposed by this Statute deprives this defendant of its property without due process of law, and the said statute is in direct conflict with Section 1, Article 14, Constitution of the United States.

(*c*) The act in question is a regulation of inter-state commerce and is in conflict with the act of Congress known as the Carmack Amendment, passed on June 29th, 1906, amending the twentieth section of "An Act to Regulate Commerce between the States," passed February 4th, 1887, and is, for this reason, null and void, because it is unconstitutional.

Testimony.

Plaintiff's Testimony.

In neighborhood of 1200 lbs. I filed my claim. About 60 or 70 days. No sir. Did not sign any Bill of Laden for the goods in dispute. With Mr. J. S. Newlin, Agent in Hampton County, S. C. $14.75 damage and over charge $4.60 infreight. Said would settle if would knock off 82 cents. Would pay the claim. I filed claim $14.75 and $4.60 overcharge freight. I had claim filed first for $5.00 and some odd cents. Mr. Newlin and myself corrected the matter before statement turned over to Mr. Varn. I suppose it is an error in the complaint where it is alleged that overcharges were $5.25.

X—They did not offer me anything before 60 days' time. Shipment made from High Point, N. C.

L. H. CARTER.

Claim Overcharge Freight.

To overcharge in freight on car shipped from Tate Furniture Co. Your weight 13,700 lbs., actual weight 12,993 lbs. which is a difference of 707 lbs., at 65 ..... $4.60

STATE OF SOUTH CAROLINA,
County of Hampton:

Personally appeared before me L. H. Carter who being duly sworn says that the above wts. are correct. Car N. Y., N. H. & H. 71517.

L. H. CARTER.

Sworn to before me this 20th, day of June 1912.
[SEAL.]

C. O. CARTER,
N. P. for S. C.

Claim Damage to Furniture.

To damage and repairs to furniture shipped in car N. Y. N. H. & H. No. 71517.

3 No. 638 Tops split off $1.25 ..... $3.75

Above From Tate Furniture Co.

Below From Continental Furniture Co.:

1 No. 550 Bed broken 5.00
1 " 550 Washstand and Toilet Base and leg broken 6.00

$14.75

Letter.

3-21-12.

Tate Furniture Co., High Point, N. C.

Varnville Furn. Co., Varnville, S. C.

GENTLEMEN: We have shipped your car of goods and wish to suggest that you have the car re-weighed when it reaches your place. It appears to us that the railroad company has this at least 1,000 too much for according to our weights there is about 12,300 lbs. in the car. We hope that you can arrange to have the car re-weighed and if there is an overcharge have it adjusted.

Yours truly,

TATE FURNITURE CO.

Invoice.

3-16-12.

Tate Furniture Co., High Point, N. C.

Collect.

Sold to Varnville Furniture Co., Varnville, S. C.
Order 256.
Salesman, Garnett.
Terms, Oct. 1st-10 per cent 30-60 net.
Mirrors, Safes and other furniture up to the sum of $444.75.

Freight Bill.

C & W C—Allendale, S. C., 3-26-1912.

7 No. 165, N. Y., N. H. & H., 71517.

	Articles.	Weight.	Rate.	Amount.	Advance.
Furniture.....	13700	20	27.40	61.65	89.05

J. S. NEWLIN, *Agent.*

Damage Claim.

C-L Com.
Furniture.
3 Tops split.
1 Bed broken.
1 Wash Stand Base and Leg broken.

Defendant's Testimony.

It is agreed between Counsel for Plaintiff and Defendant that the following written statements of H. C. Massey and R. H. Stedman, witnesses for defendant in this action, shall be taken and used as their sworn testimony at the trial of this said cause. In other words, it is admitted and agreed that if they were present they would testify as follows:

H. C. MASSEY: I live in High Point, N. C. and am employed by the Southern Weighing and Inspection Bureau, and am acting as Inspector in charge at High Point, N. C. I have held this position for about 14 months. I test weighed similar articles as those comprised shipment Tate Furniture Co. and Continental Furniture Co. to Varnville Furniture Co., from Varnville, S. C. There was also in this car a shipment the Best Chair Company, as I am informed. This I did not test weigh, account their factory being burned. They (Best Chair Company) estimated the weight of their shipment at 700 pounds. The other test weights showed total weight of shipment to be 13,105 including the 700 lbs. An allowance of
8 500 pounds is made in variation of scale weights of car load shipments.

H. C. MASSEY.

R. H. STEDMAN, if present, would swear:

I live in High Point, N. C., and am employed by the Southern Railway as Yard Conductor. On the 19th day of March 1912 I weighed N. Y. N. H. & H. 71517 shipped from High Point, N. C. to Varnville, S. C., with following results: Gross weight 48400, weight of Car 34700, Net 13700. I got these weights from the original record made by myself at the time of the weighing. The paper hereto attached marked Ex. A. is my original record of the weight of this shipment in question.

R. H. STEDMAN.

Judgment of the Magistrate.

I find for the plaintiff the full amount claimed, both damages and penalty.

J. G. MURDAUGH, [L. S.]
Magistrate.

Notice and Grounds of Appeal.

To J. G. Murdaugh, Esq., Magistrate, and to S. G. Varn, Esq., Attorney of the Plaintiff in the above-stated action:

You Will Please Take Notice, That the defendant appeals from the judgment rendered against it, in favor of the plaintiff in this action, at the trial of this cause, to the circuit court, the said judgment having been rendered on October 18, 1912, for the sum of $19.35, damage to freight and overcharge, and a penalty of $50.00 for failure to adjust in statutory time, upon the following grounds:

1. Because the Magistrate erred in overruling the defend-
9 ant's demurrer to the second cause of action stated in plaintiff's complaint, to wit: the allegation that defendant was liable for the penalty of $50.00.

2. Because the Magistrate erred in refusing to hold and find (*a*) That the act of the General Assembly of South Carolina approved Feb. 15, 1910, entitled "An Act etc. etc." and the act of Feb. 23,

1903, and acts amendatory thereof, which regulate the manner in which common carriers doing business in this state shall adjust freight charges for loss of or damage to freight, etc., are unconstitutional as applied to an interstate shipment, because they tend to regulate interstate commerce; and constitute a direct burden upon said interstate commerce; (*b*) That the penalty imposed by these statutes deprives defendant of its property without due process of law, and the said Statutes are in direct conflict with Sec. 1, Art. 14 of the Constitution of the United States. (*c*) That the Acts in question are a regulation of interstate commerce and are in conflict with the act of Congress known as the Carmack Amendment, passed on the 29th. of June 1906, amending the 20th Section of an Act to regulate commerce between the states, passed Feb. 4, 1887, and are for this reason, unconstitutional, null and void.

Wherefore, Defendant demands that the judgment of the Magistrate herein be reversed as to this penalty of $50.00.

JAMES W. MOORE,
Defendant's Attorney.

Hampton, S. C., October 22nd, 1912.

Report of Magistrate.

To the Honorable Judge of the Court of Common Pleas for Hampton County:

10 The above entitled action came on for trial before me at Varnville, S. C., on October 18th, 1912. The action was for damage to freight and overcharge, and for a penalty of $50.00 for failure to adjust within the time allowed by law.

The defendant answered by general denial, after demurring to the second cause of action in plaintiff's complaint, to wit: The allegation as to liability for penalty. I overruled demurrer and ordered case to trial on both causes alleged. Defendant took the position that this penalty, as applied to an interstate shipment, was a burden on interstate commerce; that it is unconstitutional, null and void. All of which positions I found against, and gave judgment for the plaintiff in the full amount claimed both damages and penalty.

All of which is respectfully submitted.

J. G. MURDAUGH,
Magistrate.

Order of Circuit Judge on Appeal.

The above case coming up on appeal, after hearing the Atty. for Defts. and argument of Pl'ffs Atty. It is ordered that the Court below is hereby affirmed and the appeal dismissed.

R. W. MEMMINGER,
Presiding Judge.

December 13, 1912.

Exceptions.

The defendant-appellant herein excepts to the Order of His Honor, Judge R. W. Memminger, on the following grounds:

11 1. Because it was error for the Circuit Judge to sustain the Magistrate in over-ruling demurrer of defendant to plaintiff's second cause of action, the allegation that defendant was liable for the penalty of $50.00, the complaint showing on its face that the shipment was interstate.

2. Because it was error to hold that the defendant was liable for the penalty, and refusing to hold that the Act of the General Assembly of South Carolina, approved Feb. 23, 1903, known as the penalty statute, and the Act of Feb. 15, 1910, and Acts amendatory to both Acts, which regulate the manner in which common carriers doing business in this state shall adjust freight charges for loss of or damage to freight, etc., are unconstitutional as applied to an interstate shipment, because they tend to regulate interstate commerce, and constitute a direct burden upon said interstate commerce.

3. Because the said Circuit Judge refused to hold that the penalty imposed by these statutes deprives defendant of its property without due process of law, and the said statutes are in direct conflict with Sec. 1, Art. 14 of the Constitution of the United States.

4. The undisputed and admitted testimony in the case shows that this was an interstate shipment of freight and it is respectfully submitted that his Honor erred in applying the provisions of the Act of the General Assembly of the State of South Carolina, approved Feb. 23, 1903, commonly known as the Penalty Statute, and the Acts of the General Assembly of the State of South Carolina, amendatory thereof, which regulate the manner in which common carriers doing business in the State of South Carolina shall adjust freight charges for loss of or for damage to freight etc., and confirming the judgment of the Magistrate allowing a penalty of Fifty Dollars against the defendant as a penalty under and by virtue of the terms of the said Act and amendments thereof, of the

12 State of South Carolina, because:

(*a*) The statute of South Carolina referred to is a burden on and regulation of interstate commerce, and is in conflict with and repugnant to the commerce clause, and to the due process equal protection clauses of the Constitution of the United States, and his Honor should have so held and reversed the judgment of the Magistrate allowing a penalty of Fifty Dollars.

(*b*) The Congress of the United States by an act of June 29th, 1906 amending the interstate commerce act of February 4th, 1887, designated generally as the Carmack Amendment, has undertaken to regulate interstate shipments, which legislation and regulation is exclusive, and repeals and renders void any attempted regulation thereof by the several States, and the Statute of South Carolina above referred to, is therefore null and void, and in conflict with the Acts of Congress in this behalf, and his Honor should have so held and reversed the judgment of the Magistrate for the penalty of Fifty Dollars herein.

(c) The Act of Congress as amended by the act of June 29th, 1906, is exclusive of all State legislation on the subject of interstate commerce, and his Honor should have so held and reversed the judgment of the Magistrate herein allowing a penalty against the defendant in the sum of Fifty Dollars on an interstate shipment, as a penalty under and by virtue of the terms and provisions of the act of the State of South Carolina.

F. B. GRIER,
J. W. MANUEL,
Attorneys for Defendant-Appellant.

To S. G. Varn, Esq., and J. W. Vincent, Esq., Attorneys for Plaintiff-Respondent:

Take Notice, That the defendant-appellant herein proposes
13 the foregoing pages as the "Case" on appeal to the Supreme Court, and that the same when printed shall constitute the "Return" for this appeal when filed with the Clerk of the Supreme Court.

F. B. GRIER,
J. W. MANUEL,
Attorneys for Defendant-Appellant.

It is agreed that the Southern Railway Company received this shipment at High Point, N. C., to be transported over its line and connecting lines to Varneville, S. C., and issued its usual Bill of Lading therefor. That the plaintiff was the consignee and owner and holder of the bill of lading.

[Seal Supreme Court of South Carolina.]

J. W. VINCENT,
Pltff's Att'y.
F. B. GRIER,
J. W. MANUEL,
Def't's Att'y.

A true copy.
N. R. BROOKS, *Clerk.*

14 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1913.

VARNVILLE FURNITURE COMPANY, Plaintiff-Respondent,
vs.
CHARLSTON & WESTERN CAROLINA RAILWAY CO., Defendant-Appellant.

Opinion by D. E. HYDRICK, *A. J.:*

Plaintiff recovered judgment against defendant in a magistrate's court for $14.75, damages done to a shipment of furniture, while in defendant's possession in this state, and $4.60 overcharges in the

freight collected by defendant thereon, and $50.00, the penalty allowed by statute (Civ. Code, 1912, Sec. 2573) for the failure of defendant to pay plaintiff's claim for said damages and overcharge within forty days after the filing thereof with defendant's agent. The initial carrier, the Southern Railway Company, received the shipment at High Point, N. C., to be transported over its own and connecting lines and delivered to plaintiff at Varnville, S. C., and issued its usual bill of lading therefor. Defendant received the shipment from the Southern Railway Company at Allendale, S. C., and delivered same to plaintiff at destination in a damaged condition. The circuit court affirmed the magistrate's judgment.

The only question made in the courts below and brought here by the grounds of appeal is that the statute above cited, under which defendant was penalized for its failure to pay plaintiff's claim within the time required, is void, as applied to interstate commerce, because (*a*), it unlawfully regulates and unreasonably burdens the same; and (*b*) it deprives defendant of its property without due process of law, and denies to it the equal protection of the laws; and (*c*), it is in conflict with that provision of the Federal statute regulating interstate commerce, known as the Carmack amendment.

The learned counsel for appellant admits that the first and second grounds above stated have been foreclosed by the decisions of this court which have been affirmed by the Supreme Court of the United States in Mazursky v. A. C. L. R. Co., 216 U. S., 122 54 L. ed. 411, in which the validity of the statute now under consideration was affirmed. He contends, however, that the third ground was not involved in any of those cases, and that the effect of the Federal statute above referred to, as it has been interpreted and applied in recent decisions of the Federal Supreme Court, has been to supersede and annul the state statute.

It is said that the delicts upon which the penalties were inflicted in the Mazursky case, and the others decided with it, occurred prior to the adoption of the Carmack amendment. As to that matter, the reports of those cases (except the Charles case) are silent. But, if the fact be as stated by appellant's counsel, it is true that the Federal statute would not have defeated the recovery of penalties incurred prior to its enactment. Yazoo &c. R. Co. v. Greenwood Grocery Co. (U. S.), decided Jan. 20, 1913, L. ed.

But the arguments in the Supreme Court of the United States in the Mazursky case show that the point was made and pressed upon the attention of the court, that, if the state ever had power to enact this statute, it was valid only until Congress should take action upon the same subject, and that Congress having taken such action, by the passage of laws regulating interstate commerce in great detail, it had thereby excluded or superseded the power of the state. At the time those cases were argued, the Carmack amendment had been on the statute books over three years, and if it had the effect which is now claimed for it, it is strange that it was not mentioned either by counsel who argued the cause or by the court in its opinion in disposing of the contention above stated, as was done in the Greenwood Grocery Company's case above cited, with regard to a similar effect

given to the provisions of the Hepburn act. The omission points with force to the conclusion that it was not supposed, either by counsel or by the court, to have any bearing upon the point at issue. Because, even though, for the reason above stated, it could not have controlled the decision, yet it would almost certainly have been advanced as an argument tending to show the intention of Congress to take possession of the field covered by the state statute. Besides
16 this, the Mazursky case has been cited several times by the Supreme Court of the United States in cases subsequently decided which involved the superseding effect of the provisions of the Federal statute regulating interstate commerce upon conflicting state laws, without any intimation that its authority is limited by the fact suggested. On the contrary, in Southern Ry. Co. v. Reid, 222 U. S. 436, 56 L. ed. 260, in answering the contention, which was based upon the authority of the Mazursky case and the James case (162 U. S. 650, 40 L. ed. 1105), that the North Carolina statute under consideration was a valid exercise of the police power of the state, the court said: "In those cases, and in the later case of Western U. Teleg. Co. v. Commercial Mill. Co., 218 U. S. 406, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59, the principle is expressed that 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce.' Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the Telegraph Company Cases, there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by particular state statutes. In the Railroad Case, a statute of the State of South Carolina which required carriers to settle within a specified time claims for loss of or damage to freight while in their possession within the state was sustained against the objection that it was an interference with interstate commerce. *In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision.* The circumstance is important, and we are brought to the inquiry whether it exists in the present case". (Italics added.) It appears therefore that, even as late as the decision of the Reid case, which was filed in January, 1912, the court had not discovered that there was any conflict between the Carmack amendment and this statute, the validity
17 of which was affirmed in the Mazursky case upon the ground of the absence of *"any Federal legislation upon the subject involved."*

But, treated as an open question, the conclusion *in* inevitable that there is no such conflict. We wish to make it clear at the outset, that we concede that the authority of Congress to regulate interstate and foreign commerce is supreme and unlimited, except by the Federal constitution; and that, when Congress legislates upon any particular subject of such commerce, all conflicting state laws, whether statute or common law, affecting the same subject, are thereby superseded.

On the other hand, we maintain that, in the absence of such legislation, the police power of the state remains unimpaired. These propositions are universally recognized, and they have been reaffirmed in the very latest decisions of the Supreme Court of the United States. Smithe v. Alabama, 124 U. S. 465, 31 L. ed. 508; Chicago &c. R. Co. v. Solan, 169 U. S. 133, 42 L. ed., 688; Pennsylvania R. Co. v. Hughes, 191 U. S. 477; 48 L. ed. 268; Chicago &c. R. Co. v. Arkansas, 219 U. S., 453, 55 L. ed. 290; Adams Express Co. v. Croninger, (U. S.), decided Jan. 6, 1913; Simpson v. Shepard, (U. S.) (Minnesota rate case), decided June 9, 1913.

Let us inquire, then, what is meant by "The subject", when it is said that, when congress has legislated upon or taken possession of "the subject", inconsistent state laws are superseded. This question was considered in Southern Railway Co. v. Reid, supra, where the Court said: "It is well settled that if the state and congress have a concurrent power, that of the state is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214 that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the states over merely incidental matters. 'In other words', and we quote from the opinion, 'the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regu-
18 lations conducive to the welfare and convenience of its citizens. * * * *Until specific action* by congress or the commission, the control of the state over those incidental matters remains undisturbed'. The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared to be a common law duty which the State might, 'at least, in the absence of congressional action, compel a carrier to discharge'. The principle of that case, therefore, requires us *to find specific action* either by Congress in the interstate commerce act, or by the commission, covering the matters which the statute of North Carolina attempts to regulate". (Italics added).

The same question is so clearly and fully discussed in Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, and that case is so directly in point that we quote from the opinion at length. After stating that the statute of Indiana, which was assailed in that case, and which was adopted in 1907, *after* the passage of the pure food and drugs act of Congress, of June 30, 1906, covered the same general subject, the court pointed out that the provisions of the state statute upon which it was attacked as being in conflict with the food and drugs act were not included in the legislation of Congress, and, on that

ground, it was held that there was no conflict between the two and that the state law was therefore valid. The court said: *"But this* (the legislation of congress) *does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients,* (the thing prohibited by the act of Congress) *and it may be quite another to give no information as to what the ingredients are* (the thing required by the state statute). As is well known, products may be sold, and in case of so called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to
19 be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture.

"Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana Statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent impositions upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding' (sec. 8). We have already noted the limitations of the provisions referred to. It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

"Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considerd, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect — the state law must yield to the regulation of Congress within the sphere of its delegated power. Texas & P. R. Co. v. Abeline Cotton Co., 204

U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, ante
20 237, 239, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 436, ante 257, 260, 32 Sup. Ct. Rep. 140.

"*But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.* This principle has had abundant illustration. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688; 19 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187, U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Pennsylvania R. Co v. Hughes, 191 U. S., 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, Crossman v. Lurman, 192, U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. cas. 1101; Northern P. R. Co. vs. Washington, 222 U. S. 370, 379, ante 237, 240 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 442, ante 257, 262 32 Sup. Ct. Rep. 140.

"In Missouri, K. &. T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, the supreme court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the state certain cattle alleged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the state of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, Chap. 60 (23 Stat. at L. *sl*, U. S. Comp. Stat. 1901, p. 299), known as the animal industry act, together with the act of March 3, 1891, Chap. 544 (26 Stat. at L. 1044) appropriating money to carry out its provisions, and sec. 5258 of the Revised statutes (U. S. Comp. Stat. 1901, p. 3564), *covered substantially the whole subject of the transportation from*
21 *one state to another state of live stock capable of imparting contagious disease*, and therefore that the state of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals, and for the report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the Commissioner of Agriculture, and certified to the executive authority of each state and territory. Special investigation was to be made for the protection of foreign commerce, and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel, should receive for transportation, or transport, from one state to another any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot

or transport in private coveyance from one state to another, any live stock, knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act, were to be guilty of a misdameanor punishable by fine or imprisonment.

"The court held that this Federal legislation did not override the statute of the state; that the latter created a civil liability as to which the animal industry act of Congress had not made provision. The court said (supra, pp. 623, 624):

'May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of congress passed in the execution of a clear power under the Constitution, *unless the*

22 *repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.* Sinnot v. Davenport, How. 227, 243, 16 L. ed. 243, 247 * * * Whether a corporation transporting, or, the person causing to be transported, from one state to another, cattle, of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owner of domestic cattle by reason of the introduction into their state of such diseased cattle, is a subject about which the animal industry act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that state of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability."

"In Reid. v. Colorado, 187, U. S. 137, 47 L. ed. 108, 23 Sup. Ct Rep. 92, 12 Am. Crim. Rep. 506, the question arose under a statute of Colorado which had been passed to prevent the the introduction into the state of diseased animals. The statute made it a misdemeanor for any one to bring into the state between April 1 and November 1 any cattle or horses from a state, territory, or county south of the 26th parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to importation, or unless the owner of person in charge should procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious disease, and had not been exposed thereto at any time within the preceding ninety days. The expense of any inspection in connection therewith was to be paid by the owner.

"The plaintiff in error had been convicted of bringing cattle into the state in violation of the statute. There was no proof in the case

that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the 26th parallel, without being held or inspected as the statute
23 required. Its provisions were ignored altogether as invalid legislation. When the plaintiff in error refused to assent to the state inspection, he showed to the authorities a certificate signed by the assistant inspector of the Federal bureau of animal industry, who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the animal industry act of Congress, but the court sustained the state law for the reason that, although the two statutes related to the same general subject they did not cover the same ground and were not inconsistent with each other.

"The court thus emphasized the general principle involved (supra, p. 148): '*It should never be held that Congress intends to supersede, or by its legislation suspend the exercise of the police power of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts should not be reconciled or consistently stand together.*'" Italics added.

In each of the cases hereinbefore cited, the court holds that the police power of the states still exists unimpaired, except in so far as laws adopted thereunder may conflict with the legislation of Congress upon the same subject. Therefore we can not accept as sound the contention of appellant's counsel, that the Supreme Court of the United States has held that the act to regulate commerce "was intended to cover and regulate the entire subject of interstate commerce, leaving nothing to the state, either by way of legislation, policy or regulation." To sustain that contention, he cites the following from the Croninger case: "Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it." When the la-guage quoted is given its proper setting, and read in connection with the context, it clearly appears that "the subject" referred to was not the whole subject of interstate commerce, but the limited subject "*of*
24 *liability of the carrier under a bill of lading which he must issue,*" as required by the Carmack amendment. The whole paragraph from which the quotation is taken reads as follows: "That the legislation (the Carmack amendment) supersedes all the regulations and policies of a particular state *upon the same subject* results from its general character. *It embraces the subject of the liability of the carrier under a bill of lading which he must issue,* and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with

reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon *the subject of such contracts.* But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist" (italics added). Read as whole, the passage shows clearly that "the subject" which the court had in mind was "the subject of such contracts," that is, of liability on contracts which any carrier receiving property for interstate transportation is required to issue.

Having seen what the subject of the Carmack amendment is, let let us examine the state statute to see what subject is dealt with by it, and thereby determine whether they cover the same subject, and whether there is any conflict between them. The state statute merely penalizes the failure of carriers to perform a common law duty—namely, the duty to make reasonably prompt settlement of the claims of shippers for loss of or damage to property while in their possession. The performance or the failure of performance of that duty has nothing whatever to do with the liability of the carrier under the contract of shipment. The statute does not attempt to impose, increase or diminish that liability, or to affect it in any way whatever. It merely says that assuming the liability to exist, the carrier should discharge it with reasonable promptness, and penalizes his failure to do so. With as much reason could it be said that a statute which imposes the costs of the action upon the losing party imposes or affects, in any way the liability upon which the action is predicated. The two things are separate and distinct. The payment of costs is imposed as a penalty for failure to pay the debt without suit, and the payment of the penalty is imposed for a like reason,—the failure to pay a just claim within a reasonable time, without compelling the shipper to resort to the courts to collect it. Where no liability exists, no penalty can be recovered, and unless the shipper recovers the full amount which he has claimed, he cannot recover the penalty. The carrier is therefore protected against being penalized for the failure to pay unjust or exorbitant claims.

We look in vain th-ough the legislation of Congress to find any rule or regulation on the subject of the prompt settlement of such claims. By no sort of implication can that subject be brought within the provisions of the Carmack amendment. That it is one proper for the exertion of the state authority, in the absence of congressional action, is settled by the Mazurxky case.

The reason for the statute and the grounds upon which it should be sustained are set forth in that case and in the Seegars case (73 S. C., 71, 207 U. S., 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28). The a-nulling of it would leave shippers at the mercy of interstate carriers, and allow them to practically confiscate small claims for loss of or damage to property while in their possession; because, in the great majority of cases, the amounts involved are too insignificant to justify the employment of legal counsel to collect them. That there was great abuse in that regard, and an evil which needed a remedy, is evidenced by the statute.

We shall next consider the decision- of the Supreme Court of the United States which are relied upon by appellant to show that the state statute conflicts with the legislation of Congress, and attempt to show that they cannot be so interpreted. The Carmack amendment reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of la-ing therefor, and shall be *laible* to the lawful holder thereof
for any loss, damage, or injury to such property caused by it
26 or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company of whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

This legislation was construed and applied in the case of Adams Express Co. v. Croninger, supra, in which the company was held liable in the state court for the full value of a diamond ring and interest thereon, to wit, $137.52, notwithstanding a limitation of the company's liability, by stipulation in the bill of lading to the agreed value, to wit: $50.00, when the shipper had obtained the lower of two alternative rates of transportation, which were based upon the value of commodities above and below $50.00, which rates had been made and filed with the Interstate Commerce Commission and duly published. The ruling of the state court was based upon the state law, which declared void all contracts limiting the common law liability of carriers. The Supreme Court of the United States held that the Carmack amendment indicated "a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states." That being the purpose all state laws conflicting therewith were necessarily superseded. As to the liability thereby imposed the court said: "The statutory liability, aside from responsibility for the default of a connecting carrier in the route, *is not beyond the liability imposed by the common law,* as that body of law applicable to carriers has been interpreted by this Court, as well as many
courts of the States" (italics added). As the liability imposed
27 except that for the default of connecting carriers) is not beyond that imposed by the common law, it certainly cannot be said to cover the same field as the statute of this state which imposed a liability unknown to the common law. We have here-

tofore pointed — the essential differences between the Federal and state law.

In Kansas City Southern Ry. Co. v. Carl, 227 U. S. —, (decided March 10, 1913), 33 Sup. Ct. Rep. 391, the principle of the Croninger case was reiterated, and, in addition, it was held that any valid limitation of liability stipulated for in the bill of lading for the benefit of the initial carrier and its connecting carriers inured to the benefit of each succeedng carrier in the route.

The case of Missouri, K. & T. R. Co. v. Harriman Brothers, 227 —, (decided March 10, 1913) 33 Sup. Ct. Rep., 397, came within the principle of the Croninger and Carl Cases, and it was further held, in that case, that a stipulation in the bill of lading limiting the time to 90 days within which an action could be brought against the carrier to enforce the liability incurred thereunder was reasonable and valid, and that it superseded state statutes which declared such a stipulation invalid, in so far as the same were applied to interstate shipments. In each of the foregoing cases, the subject regulated by the State was embraced in the contract for interstate transportation, control of which had been assumed by Congress in the Carmack amendment.

The case of Chicago &c. R. Co. v. Hardwick Farmers Elevator Company 226 U. S. — (Decided Jan. 6, 1913), does not come under the Carmack amendment, but under section one of the Hepburn act, amending the original act to regulate commerce. In the Hardwick case, the state court imposed upon a carrier a penalty provided by the statute of Minnesota for delay in furnishing cars to initiate an interstate shipment. The original act to regulate commerce declared that the term "transportation" should embrace all instrumentalities of shipment or carriage, and the Hapburn Act declared that it "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and hen-
28 dling or property transported; *and it shall be the duty of every carrier subject to the privisions of this act to provide and furnish such transportation upon reasonable requests therefor, and to establish th-ough routes* and reasonable rates applicable thereto" (italics added). The Supreme Court reversed the state court, and held that "Congress has legislated concerning the *deliveries of cars* in interstate commerce by carriers subject to the act." Not only had the act of Congress imposed upon such carriers the specific duty of furnishing cars for interstate shipments, but it had gone further and provided remedies and penalties for the violation of that duty. It necessarily followed that the state law *asa* superseded, because it covered the same field.

In the the case of St. Louis, &c. R. C. v. Edwards, 226 U. S.— Decided Feb. 24, 1913), the court of Arkansas imposeed upon an interstate carrier the penalty provided by what was called "the demurrage statute" of that state, because of a failure to make prompt delivery of freight on arrival at destination." The Supreme Court

reversed the judgment, and held under the principle announced in the Harwick case, that the subject of the delivery of interstate shipments is so far embraced in the provisions of the Hepburn act, above quoted, as to supersede the Arkansas Statute, which dealt with the same subject.

We fail to see wherein this state statute has anything whatever to do with contracts made by the initial carrier relative to its liability or that of its successors in the route for loss or damage to the property caused by it or them, so as to bring it within the principles of the Croninger, Carl and Harriman cases, or with the *receipt* or *delivery* of interstate shipments, so as to bring it within the principles of the Hardwick and Edwards cases.

In this connection, we notice the statement in the argument of appellant's counsel that this court held in the Charles case (78 S. S., 36) that "prompt delivery of goods" is the legal equivalent of "Prompt settlement of proper claims for damages," and that the Supreme Court of the United States held the same in the Mazursky case. Counsel has evidently misunderstood the court. The language used was: "The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce it is an aid thereto by its tendency
29 too promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claims for damages." From the context, it appears that the court meant only that the effect of the statute was not to burden interstate commerce, but rather to benefit it, by stipulating carriers to take proper care of goods while in their custody, so that delivery thereof in good condition would be made, knowing that, if they failed in that duty, they would be under the compulsion of the statute to perform the alternative duty of making prompt settlement of proper claims therefor. The language of this court above quoted, and much more of the opinion of thic court in the Charles case was quoted in the opinion of the Supreme Court of the United States in the Mazursky case, but no comment was made upon this point and it was not an element of decision.

Appellant's next contention is that the Carmack amendment conflicts with and supersedes the state statute, because it required that all actions for loss of or damage to interstate shipments shall be brought against the initial carrier, while the state statute requires that they shall be brought against the terminal carrier. In this, appellant has erroneously construed both the Federal and the state statutes. The Federal statute does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the initial carrier, receiving property for interstate transportation. While it says that that carrier chall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier only. On the contrary, the act expressly preserves the right of the holder of the bill of lading to pursue the carrier which actually caused the loss or damage, for it saus, "nothing in this section shall deprive any holder of such

receipt or bill of lading of any remedy or right of action which he has under existing law." Certainly, under the law, as it existed at that time, the holder of the bill of lading had a right of action against the carrier which actually caused the loss or damage. In fact, prior to the Carmack amendment, as the result of the almost universal practice of carriers to limit their liability by stipulation in the bill of lading to loss or damage occurring on their own lines, that was practically the only right he did have, in case of
30 loss of or damage to his goods in the course of interstate transportation; and the fact that he frequently found it very difficult, and sometimes impossible, to find out which one of the several connecting carriers was actually in default, and the expense and inconvenience of prosecuting his claim against a carrier in a distant state, were some of the reasons which led to the adoption of the Carmack amendment. Riverside Mills v. Atlantic Coast Line R. Co., 219 U. S., 200, 55 L. ed. 180. To hold that the initial carrier alone is liable to the holder of the bill of lading would, in many cases, cause the very expense and inconvenience which the statute was designed, in part at least, to obviate: A consignee in South Carolina might be compelled to bring suit against the initial carrier in California to collect a claim *on* insignificant amount, or abandon it, when the carrier whose default caused the loss or damage was at his door. Such a construction of the act would defeat one of its purposes. Why should the owner of the goods be compelled to sue the initial carrier, if he can prove that the terminal carrier lost or injured his goods? And what right has the carrier who lost or injured his goods; to contend that he should not be held liable in an action by the owner? If the initial carrier is held on his statutory liability, the carrier in default is liable over to him. What difference can it make to the carrier who is ultimately liable whether he pays the damages to the owner of the goods or to the initial carrier?

It is argued, however, that in the Croninger case, the Supreme Court construed the proviso above quoted as preserving to the holder of the bill of lading only the rights or remedies which he may have had under existing Federal law. Without conceding that the language of the court, used in the connection in which it was, can be properly construed to so limit the effect of the proviso, it cannot be denied that, under the law, as it then existed and was administered by the Federal Courts, the holder of such bill of lading did have a right of action against the carrier which actually caused the loss or damage. Referring to the language in the Croninger case which is relied upon by counsel for appellant, the court gave, as an instance of the rights preserved by the proviso, the then existing right of the holder of the bill of lading to a remedy against a succeeding carrier in default, in the following language:
31 "One illustration would be a right to a remedy against a succeeding carrier, in preference to preceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

While the foregoing is sufficient to dispose of this contention,

so far as it affects the decision of this case, it might not be amiss, in this connection, to say that the remark of the court, which appellant relies upon, was made in answering the contention in argument in that case that all rights and remedies under all existing laws, including state laws which were in conflict with the purpose and intent of the act, were preserved by the proviso. The court pointed out the absurdity of that construction by showing that it would result in the destruction of the act by the proviso, and in the nullification by a conflicting state law of the regulation of a national subject by the supreme authority of Congress; and said, in answering that argument, that a more rational construction would be "to construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action." But that was far from saying that that was the proper construction or the only one to be given to the proviso. On the contrary, the court had already given the proviso the same construction which it had given a similar provision in the act of 1887, in the Abelene case, to wit, "that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, *not inconsistnt with the rules and regulations prescribed by the provisions of this act*" (italics added). By this language, the proviso was held to preserve rights and remedies for the redress of some specific wrong or injury given by state statute or the common law, *provided the same are not inconsistent with any rule or regulation prescribed by the act itself*,—a construction which merely harmonizes the provisions of the act with its purpose.

Equally untenable is the construction put upon the state statute by the appellant,—that it requires all actions to be brought against the terminal carrier. This court has expressly held that the terms of the statute limit "the loss and damage which a carrier is required to adjust and pay for, to that which befalls while the goods
32 are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier." Venning v. A. C. L. R. Co., 78 S. C. 56.

The judgment of the Circuit Court is affirmed.

We concur:

[Seal Supreme Court of South Carolina.]

EUGENE B. GARY, *C. J.*
T. B. FRASER, *A. J.*

[Endorsed:] 8646. The State of South Carolina. In the Supreme Court. April term, 1913. Varnville Furniture Co., Resp'd't, vs. C. & W. C. Ry. Co., Appel't. Opinion by D. E. Hydrick, A. J. We concur. Eugene B. Gary, C. J. T. B. Fraser, Resp'nt.

33 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Second Circuit, Hampton County, April Term, 1913.

No. 73.

VARNVILLE FURNITURE CO., Plaintiff-Respondent,
against
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Defendant-Appellant.

Opinion by R. C. Watts, A. J.

This action was brought in the Magistrate's Court to recover $14.78 damages to a shipment of furniture, in transit, from High Point, N. C., to Varnville, S. C., and for $5.25 overcharge in freight, and for Fifty Dollars penalty for failure to pay the claim in forty days. The Defendant demurred to so much of the Complaint as asked for penalty of Fifty Dollars on the grounds in substance That the Statute under which this action is brought is unconstitutional because it amounts to a burden on and regulates interstate commerce; because it deprives the Defendant of its property without due process of law; and because it deprives it of equal protection of the laws. The Magistrate overruled the demurrer, and defendant answered, denying the allegations of the Complaint, and the case was tried before Magistrate without a jury. From the testimony it appears that in the first week in March 1912, the Plaintiff ordered a car load of furniture from High Point, N. C., to be shipped to Varnville, S. C. The shipment was delivered to the Southern Railway Co., at High Point, N. C., to be transported over its line from High Point, N. C., to Allendale, S. C., and there delivered to the C. & W. C., the Defendant, at which point the defendant received the shipment and transported it to Varnville, S. C., and there made delivery to the plaintiff, the consignee and owner and holder of the Bill of Lading.

34 The evidence shows that the furniture was damaged in transit but whether on Defendant's line or not it does not appear. At the trial the Defendant asked the Magistrate to hold that the claim for Fifty Dollars as a penalty as applied to an interstate shipment was a burden on interstate commerce. That the penalty act as applied to an interstate shipment was unconstitutional null and void. The Magistrate refused to so hold, and gave judgment for plaintiff, for full amount claimed, and Fifty Dollars penalty. The Defendant appealed to Circuit Court, and his Honor Judge Memminger affirmed the judgment of the Magistrate's Court. The Defendant appeals, and question the correctness of his Honor's ruling. These Exceptions question the validity of the penalty act of February 23, 1903, as amended Feb. 15, 1910, on the ground that said act as applied to an interstate shipment is unconstitutional and in conflict with the due process clause and the commerce act of

the Federal Constitution. That it is a regulation of interstate commerce, and it is in conflict with the Act of Congress as amended June 29th, 1906. These exceptions should be sustained. The recent decisions of the United States Supreme Court, the final arbiter in such matters, and by whose decisions this Court is bound, clearly establishes the propositions: First, Legislation of the States in regulation of interstate commerce was permissive only, permission being implied by failure of Congress to legislate, but the permission has been taken away by recent Federal Legislation, especially the Hepburn Act, and the Carmack Amendment. Second, the provision "that nothing in this Section shall deprive any holder of such receipt or bill of lading of any remedy or right of action he has under existing laws" refers to rights and remedies provided by Federal Statutes, and necessarily excludes those provided by the State Statutes. Third, the duties and liabilities of Carriers in interstate commerce are provided by the Federal Statute, and the regulations of the Federal Statute supercede and annul all State Statutes providing penalties for the failure to perform any duty or obligation incident to interstate commerce.

Transportation is declared by the Federal Statutes to embrace all instrumentalities of shipment and carriage including "all services in connection with the *receipt delivery* elevation and transfer in transit, ventilation and refrigeration, icing, storing and handling of property transported". The words italicized indicate the reason for holding that this case falls within the rule above set out laid down by the Supreme Court of the United States in the following cases: Chicago, etc. Railroad Co. vs. Hardwick Elevator Co., 126, U. S. 427; Adams Express Co. vs. Croniger, 226 U. S. 491, Kansas City etc., Railroad Co. vs. Carl, 227 U. S. 639; St. Louis, etc. Railroad Co. vs. Edmunds 227 U. S. 265; M. K. and T. R. Co. vs. Harriman Bros. U. S. Court (Advance Sheets April 1, 1913.) These cases — fully and conclusively cover the principle involved that it seems clear to me that the judgment should be reversed.

I dissent and consur in the opinion of Mr. Justice Hydrick.

EUGENE B. GARY, *C. J.*
T. B. FRASER, *A. J.*

I dissent. See opinion.

D. E. HYDRICK, *A. J.*

[Seal Supreme Court of South Carolina.]

A true copy.
U. R. BROOKS, *Clerk.*

[Endorsed:] 8648. The State of South Carolina. In the Supreme Court. April Term. 1913. Varnville Furniture Co., Resp'd't, v. C. & W. C. Ry. Co., Appel't. Dissenting Opinion by R. C. Watts, A. J. I dissent & concur in the opinion of Mr. Justice Hydrick, Eugene B. Gary, C. J., T. B. Fraser, A. J. I dissent. See opinion. D. E. Hydrick, A. J. Filed Supreme Court of S. C. Sep. 15, 1913. U. R. Brooks.

36 *Form of Remittitur.*

STATE OF SOUTH CAROLINA:

In the Supreme Court.

VARNVILLE FURNITURE COMPANY, Pl'ff-Resp'd't,
vs.
CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Def't-Appel't.

Appeal from Circuit Court, 2d Circuit, Hampton County.

F. B. Grier & J. W. Manuel, For Appellant.
J. W. Vincent, For Respondent.

Judgment.

The judgment of the Circuit Court is affirmed.

[Seal Supreme Court of South Carolina.]

By the Court,
Attest:

U. R. BROOKS, *Clerk.*

[Endorsed:] Form of Remittitur. The State of South Carolina. In the Supreme Court. Varnville Furniture Co., Resp'd't, vs. Charleston & Western Carolina Railway Co., Appel't. Judgment of the Supreme Court. Remitted to Circuit Court for Hampton County, 1913.

37 STATE OF SOUTH CAROLINA:

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
vs.
VARNVILLE FURNITURE COMPANY, Defendant in Error.

The following is a copy of section 2573 of the Civil Code 1912 of the State of South Carolina, referred to in the decision of the Supreme Court in the above stated cause, and also a copy of section 2572 which is referred to in said section 2573.

"SEC. 2573. Freight Adjustments to be made in certain time—"Every claim for freight overcharged or for loss or of damage to "property and baggage, while in the possession of such common "carrier, shall be adjusted and paid within thirty days in case of "shipments wholly within this State, and within forty days in case "of shipments from without this State, after the filing of such "claim with the agent of such carrier at the point of destination "of such shipment; when there is no agent at such point then such

"claim to be filed with the agent at the nearest station to such "point of destination having an agent; Provided, that no such "claim shall be filed until after the arrival of the shipment or some "part thereof at the point of destination, or until after the lapse "of a reasonable time for the arrival thereof. In each case such "common carrier shall be liable for the amount of such loss or dam- "age, together with interest thereon, from the date of filing of the "claim therefor until payment thereof. Failure to adjust and pay "such claim within the periods respectively prescribed shall subject "each common carrier so failing to a penalty of fifty dollars for "each and every such failure, to be recovered by any consignee or "consignees aggrieved in any court of competent jurisdiction: Pro- "vided, That unless such consignee or consignees recover in such "action the full amount claimed no penalty shall be recovered, but "only the actual amount of the loss or damage with interest as afore- "said: Provided, further, That no common carrier shall be liable "under this section for property which never came into its pos- "session if it complies with the provisions of section 2572."

"SEC. 2572. Responsibility of Carriers under Certain Contracts— "Loss or Damage to be Adjusted—Fine—In every case of loss, dam- "age, destruction or failure to deliver any property by a common "carrier shipped over its line or any connecting line, it shall be "the duty of the initial, every intermediate and terminal carrier, "upon notice of such loss, damage, destruction or failure to deliver "out within forty days, or to trace such property lost, damaged or "destroyed, and to inform the said party so notifying when, where "and by which carrier the said property was lost, damaged or de- "stroyed within forty days. Every carrier failing or refusing to "trace such property and inform the notifying party as above stated "within forty days after such notice, shall be liable for the full "amount of the claim for loss, damage destruction or failure to de- "liver, in the same manner and to the same extent as if such loss, "damage, destruction or failure to deliver occurred on its line, and "in addition thereto, a penalty of fifty dollars, upon each claim, "to be recovered in any Court of competent jurisdiction, in the same "action with the claim, or in a separate action. The claimant shall "also be entitled to recover interest on his claim from the date of "filing same. If such initial, intermediate or terminal carrier upon
"the trial of the case, shall prove that it exercised due dili-
38 "gence and was unable to trace the property and inform as
"above provided, it shall thereupon be excused from liability "under this section. This section shall in no way repeal any other "provisions of this Chapter: Provided, That only one penalty shall "be recoverable upon the same cause of action: Provided, further, "That the actions authorized hereunder may be commenced in any "county in the State in which the carrier with which the claim is "filed is engaged in business."

The two foregoing sections of the Civil Code of the State of South Carolina, 1912, to-wit, section 2573 and section 2572, are hereby allowed as a part of the record.

EUGENE B. GARY,
Chief Justice State of South Carolina.

39 [Endorsed:] In the State of South Carolina. Charleston and Western Carolina Railway Company, Plaintiff in Error, vs. Varnville Furniture Company, Defendant in Error. Copy of Secs. 2573 & 2572 Cir. Crt., 1912. Original. F. B. Grier, Att'y, Plaintiff in Error, Greenwood, S. C.

40 STATE OF SOUTH CAROLINA:

In the Supreme Court of the State of South Carolina.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
vs.
VARNVILLE FURNITURE COMPANY, Defendant in Error.

Petition for Writ of Error.

The Charleston and Western Carolina Railway Company, conceiving itself aggrieved by the decision made and judgment entered by the Supreme Court of the State of South Carolina in the case of Varnville Furniture Company, Plaintiff-Respondent, against Charleston and Western Carolina Railway Company, Defendant-Appellant, on the 15th day of September, 1913, the said decision and judgment being final and rendered by the Supreme Court of the State of South Carolina, which is the highest Court of the State of South Carolina and the Court of last resort for the hearing and determination of said cause in the said State of South Carolina,—that was an action in the Magistrate Court for Hampton County in said State, by Varnville Furniture Company, plaintiff, against Charleston and Western Carolina Railway Company, defendant, to recover Fourteen and 75-100 Dollars, damages, alleged to have been done to a shipment of furniture while in transit from High Point, in the State of North Carolina, to Varnville, in the State of South Carolina, and Five and 25-100 Dollars, overcharge, together with Fifty Dollars as a penalty for the failure of the said defendant Railway Company to pay the claim for said alleged damage and overcharge within forty days after the filing thereof with the defendant's agent, as allowed and provided for by Civil Code of 1912, State of South Carolina, section 2573.

The defendant Railway Company demurred to the cause of action set out in the Magistrate's summons and complaint, which undertook to recover a penalty of Fifty Dollars, on the ground that the said penalty statute of the State of South Carolina as applied to an interstate shipment is unconstitutional because an attempt to

41 regulate interstate commerce, and constitutes a direct burden on interstate commerce and deprives the defendant of its property without due process of law, and is in direct conflict with section One, Art. Fourteen of the Constitution of the United States; and further that the said penalty statute of the State of South Carolina is in conflict with the Act of Congress known as the Carmack Amendment, passed on June 29th, 1906, amending the

20th section of the act regulating commerce between the States passed February 4th, 1887, and for this reason is null, and void and unconstitutional. The defendant also interposed a general denial of the allegations of the Magistrate's summons and complaint. The Magistrate overruled the demurrer and proceeded to try the case without a jury.

The testimony of the plaintiff on the trial of the cause before the Magistrate tended to show that the Southern Railway Company was the initial carrier and received the shipment of furniture in question at High Point, in the State of North Carolina and issued therefor the usual standard bill of lading and that the shipment was to be transported over its own and connecting lines and delivered to the plaintiff Consignee at Varnville, in the State of South Carolina. That the said shipment moved over the rails of the Southern Company from High Point, in the State of North Carolina, to Allendale in the State of South Carolina, where it was received by the defendant company, a connecting carrier in the route, and by it transported over its rails to Varnville, S. C., the point of destination, and there delivered to plaintiff consignee. The shipment when delivered was found to be in a damaged condition, but there was no testimony offered by plaintiff tending to show where the damage occurred. Plaintiff also offered testimony tending to show that there was an error in the weight of the shipment of seven hundred and seven pounds in excess of the true weight amounting to Four and 60-100 Dollars, although the claim as filed by plaintiff was in the sum of Five and 25-100 Dollars overcharge. The testimony of the defendant tended to show that the weight as called for and stipulated in the bill of lading was correct, but it was unable to offer and did not attempt to offer any testimony as to where the
42 damage to the shipment occurred.

The Magistrate gave and duly entered judgment in favor of the plaintiff, Varnville Furniture Company, against the defendant, Charleston and Western Carolina Railway Company for the full amount of the alleged damage and overcharge, amounting to Nineteen and 35-100 Dollars, and for the penalty of Fifty Dollars, aggregating Sixty Nine and 35-100 Dollars, which was duly entered as required by law.

The defendant Railway Company within the time allowed by law, gave notice of appeal from the Magistrate's judgment to the Court of Common Pleas in and for the County of Hampton, State of South Carolina and asked that the judgment of the Magistrate which was rendered and duly entered on October 18th, 1912, for the penalty of Fifty Dollars, be reversed and set aside, on the following grounds and assignments of error, and for the following reasons:

"Because the Magistrate erred in refusing to hold and find (*a*) "That the act of the General Assembly of South Carolina approved "Feb. 15, 1910, entitled 'An Act etc. etc.' and the act of Feb. 23rd, "1903, and acts amendatory thereof, which regulate the manner in "which common carriers doing business in this state shall adjust "freight charges for loss of or damage to freight etc. are unconsti-

"tutional as applied to an interstate shipment, because they tend "to regulate interstate commerce; and constitute a direct burden "upon interstate commerce. (*b*) That the penalty imposed by "these statutes deprives defendant of its property without due pro- "cess of law, and the said statutes are in direct conflict with Sec. 1, "Art 14 of the Constitution of the United States. (*c*) That the "Acts in question are a regulation of interstate commerce and are "in conflict with the act of Congress known as the Carmack Am- "endment, passed on the 29th of June, 1906 amending the 20th "section of an act to regulate commerce between the states, passed "Fed. 4, 1887, and are for this reason unconstitutional, null and "void.

"Wherefore, defendant demands that the judgment of the Magis- "trate herein be reversed as to this penalty of $50.00."

The hearing of this appeal was duly had before the Honorable R. W. Memminger, a Judge of the Court of Common Pleas in and for the State of South Carolina, presiding at the December 1912 term of the said Court of Common Pleas in and for the County of Hampton, who after the argument and hearing of said appeal did order and adjudge on December 13th, 1912, that the appeal be dismissed and the judgment of the Magistrate Court be affirmed, from which the defendant railway company, plaintiff in error, within the time allowed by law, gave notice of its intention to appeal there-
43 from to the Supreme Court of the State of South Carolina, and thereafter and within the time allowed by law and in accordance with the practice of the Courts of the State of South Carolina, duly excepted and appealed the case to the Supreme Court of the State of South Carolina and asked the Supreme Court of said State to reserve the said judgment.

The said appeal duly came on for a hearing and argument before the Suupreme Court of the State of South Carolina, and your petitioner through its counsel duly argued that the said judgment should be reversed, claiming and contending:

"That the Commerce Act of Congress as amended by the act of "June 29th 1906, is exclusive of all State legislation, regulation or "policy, as applied to an interstate shipment, and renders null and "void the penalty act of the state of South Carolina of February, "1903, as amended by the act of February, 15th, 1910."

now codified in Code of 1912, as section 2573, and thereafter on the date aforesaid, to wit 15th day of September, 1913, the said Supreme Court of the State of South Carolina affirmed the said judgment in favor of the said Varnville Furniture Company against the said Charleston and Western Carolina Railway Company, holding and deciding the federal question involved against the said Railway Company, plaintiff in error, and denied your petitioner a title, right privilege and immunity held and claimed by your petitioner under the Constitution and Statutes of the United States, to wit, that the penalty statute of the State of South Carolina of February, 1903 as amended by the act of Feb. 15th, 1910, and found in Civil Code of

1912, 2573, is unconstitutional, null and void as applied to interstate commerce, because:

(*a.*) It unlawfully regulates and unreasonably burdens interstate commerce.

(*b.*) It deprives defendant of its property without due process of law and denies to it equal protection of the law.

(*c.*) It is in conflict with that provision of the federal statute regulating interstate commerce, known as the Carmack Amendment.

Now, therefore, it presents its Petition and Assignments of Error and prays that a Writ of Error issue out of the Supreme Court of the United States to said Supreme Court of the State of
44 South Carolina to the end that the transcript of the record proceedings and papers in said matter may be removed to the Supreme Court of the United States and the errors complained of may be examined and corrected and the judgment and decision aforesaid of said Supreme Court of the State of South Carolina be reviewed and reversed and that the amount of the security which the said Charleston and Western Carolina Railway Company shall give and furnish upon said Writ of Error be fixed upon the giving of which all further proceedings shall be suspended and stayed until the determination of the said Writ of Error by the Supreme Court of the United States.

F. B. GRIER,
Attorney for Charleston and Western Carolina Railway Company.

45 STATE OF SOUTH CAROLINA:

In the Supreme Court of the State of South Carolina.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY,
Plaintiff in Error,
vs.
VARNVILLE FURNITURE COMPANY, Defendant in Error.

Assignments of Error.

The Charleston and Western Carolina Railway Company, plaintiff in error in the above entitled cause, complains of the judgment rendered against it in said cause by the Supreme Court of the State of South Carolina, and makes the following assignments or error, which it alleges occurred upon the trial of the said cause and in the judgment of the said Supreme Court of the State of South Carolina.

First.

Error in the Supreme Court of the State of South Carolina in holding and deciding that section 2573 Civil Code of 1912, of the State of South Carolina, is valid and constitutional as applied to an interstate shipment, under which said section a penalty of Fifty Dollars was rendered against the defendant Railway Company, plaintiff in

error, for its failure to pay the claim of Varnville Furniture Company, defendant in error, on account of damage done in transit to a shipment of furniture moving in interstate commerce, whereas it should have reversed the said judgment for a penalty of Fifty Dollars and held that the said section, 2573, as applied to an interstate shipment since the passage of the Act of Congress of June 29th, 1906, amending the Commerce Act of Congress of February 4th, 1887, and designated as the Carmack Amendment is unconstitutional, null and void as being in conflict with the said Carmack Amendment, and as an attempt on the part of the State of South Carolina to regulate interstate commerce, and imposes a direct burden thereon.

Second.

Error in the Supreme Court of the State of South Carolina in over-ruling plaintiff's second exception to the judgment appealed from, which was as follows:

"Because it was error to hold that the defendant was liable for
" the penalty, and refusing to hold that the Act of the Gen-
46 " eral Assembly of South Carolina, approved Feb. 23, 1903,
" known as the penalty statute, and the Act of Feb. 15, 1910,
" and Acts amendatory to both acts, which regulate the manner in
" which common carriers doing business in this state shall adjust
" freight charges for loss of or damage to freight, etc., are unconstitu-
" tional as applied to an interstate shipment, because they tend to
" regulate interstate commerce, and constitute a direct burden upon
" said interstate commerce."

Third.

Error in the Supreme Court in over-ruling plaintiff's third exception to the judgment appealed from, which was as follows:

" Because the said Circuit Judge refused to hold that the penalty
" imposed by these statutes deprives defendant of its property with-
" out due process of law, and the said statutes are in direct conflict
" with Sec. 1 Art. 14 of the Constitution of the United States."

Fourth.

Error in the Supreme Court in over-ruling plaintiff's fourth exception to the judgment appealed from, which was as follows:

"The undisputed and admitted testimony in the case shows that
" this was an interstate shipment of freight and it is respectfully sub-
" mitted that his Honor erred in applying the provisions of the act of
" the General Assembly of the State of South Carolina, approved
" Feb. 23, 1903, commonly known as the Penalty Statute, and the
" acts of the General Assembly of the State of South Carolina, amen-
" datory thereof, which regulate the manner in which common car-
" riers doing business in the State of South Carolina shall adjust
" freight charges for loss of or for damage to freight, etc. and con-
" firming the judgment of the Magistrate allowing a penalty of Fifty
" Dollars against the defendant as a penalty under and by virtue of

"the terms of the said act and amendments thereof, of the State of "South Carolina because:—

"(*a*). The Statute of South Carolina referred to is a burden on "and regulation of interstate commerce, and is in conflict with and "repugnant to the commerce clause and to the due process equal "protection clauses of the Constitution of the United States, and his "Honor should have so held and reversed the judgment of the Magis- "trate allowing a penalty of Fifty Dollars.

"(*b*). The Congress of the United States by an act of June 29th "1906, amending the interstate commerce act of February 4th, "1887, designated generally as the Carmack Amendment has under- "taken to regulate interstate shipments, which legislation and regu- "lation is exclusive and repeals and renders void any attempted "regulation thereof by the several states, and the State of South "Carolina above referred to, is therefore null and void and in con- "flict with the acts of Congress in this behalf, and his Honor should "have so held and reversed the judgment of the Magistrate for the "penalty of Fifty Dollars herein.

"(*c*). The Act of Congress as amended by the Act of June 29th, "1906, is exclusive of all State legislation on the subject of inter- "state commerce, and his Honor should have so held and reversed "the judgment of the Magistrate herein allowing a penalty against "the defendant in the sum of Fifty Dollars on an interstate ship- "ment, as a penalty under and by virture of the terms and pro- "visions of the act of the State of South Carolina."

Whereas, the said Supreme Court of the State of South Carolina should have sustained the said exception and should have
47 held:

(*a*). That the said penalty statute, to wit, the act of Feb. 23, 1903 and the act of Feb. 15, 1910, codified as section 2573 Civil Code State of South Carolina, 1912, is in conflict with the act of Congress of June 29th, 1906, designated generally as the Carmack Amendment, amending the Interstate Commerce Act of Feb. 4, 1887.

(*b*). That the Act of Congress of June 29th, 1906—Carmack Amendment—amendng the Commerce Act of Congress of Feb. 4, 1887, is exclusive and repeals and renders void any regulation of this subject by the several States, and that the penalty statute of the State of South Carolina, Civil Code, 1912, section 2573, as applied to an interstate shipment is null and void and in conflict with the said Act of Congress.

(*c*). That the said statute of the State of South Carolina, Civil Code, 1912, section 2573, as applied to an interstate shipment is a regulation of Interstate Commerce and repugnant to the Commerce Clause and due process clause and equal protection clause of the Constitution of the United States.

For which errors the defendant, Charleston and Western Carolina Railway Company prays that the said judgment of the Supreme Court of the State of South Carolina be reversed and a judgment rendered in favor of the defendant company for costs.

F. B. GRIER,
Attorney for Plaintiff in Error.

Service acknowledged of a copy of the foregoing petition for writ of error and assignments of error in the above stated cause this 7th day of October, 1913.

J. W. VINCENT,
Attorney for Defendant in Error.

48 [Endorsed:] State of South Carolina. Charleston and Western Carolina Railway Company, Plaintiff in Error, vs. Varnville Furniture Company, Defendant in Error. Petition for Writ of Error. Assignment of Error. Original. F. B. Grier, Att'y for Plaintiff in Error, Greenwood, S. C.

49 UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Supreme Court of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Carolina, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the suit between Varnville Furniture Company, Plaintiff-Respondent against Charleston and Western Carolina Railway Company, Defendant-Appellant, wherein was drawn into question a right, title, privilege and immunity claimed by said Charleston and Western Carolina Railway Company under the Constitution and laws of the United States, to wit, that the penalty statute of the State of South Carolina of February, 1903 as amended by the act of February 15th, 1910 and codified in Civil Code of 1912 as section 2573, is unconstitutional, null and void as applied to Interstate Commerce, and repugnant to the Constitution and laws of the United States, in that the said Statute of the State of South Carolina:

(*a*). Unlawfully regulates and unreasonably burdens Interstate Commerce.

(*b*). It deprives defendant of its property without due process of law and denies to it equal protection of the law.

(*c*). It is in conflict with that provision of the Federal Statute regulating Interstate Commerce and known as the Carmack Amendment, and the said decision and judgment of the Supreme Court of the State of South Carolina was in favor of the validity of said statute and against the title, right, privilege and immunity claimed and relied on under such clause of the Constitution and laws of the United States, and a denial of the same—a manifest error hath happened to the great damage of the Charleston and Western Carolina Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
50 Court of the United States, together with this Writ, so that you have the same at Washington within thirty days from

the date hereof, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States the 7 day of October in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States of American the one hundred and thirty eighth.

[Seal United States District Court, Eastern District So. Ca.]

RICHARD W. WATSON,
Clerk U. S. D. C. S. C.

Allowed by
EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

We accept service of above Writ of Error this 7th day of October, 1913.

J. W. VINCENT,
Counsel for Varnville Furniture Company.

51 [Endorsed:] State of South Carolina. Charleston and Western Carolina Railway Company, Plaintiff in Error, vs. Varnville Furniture Company, Defendant in Error. Writ of Error. Original. F. B. Grier, Att'y for Plaintiff in Error, Greenwood, S. C. Filed: Supreme Court of S. C. Oct. 3, 1913. U. R. Brooks, Clerk.

[Seal Supreme Court of South Carolina.]

52 Original.

STATE OF SOUTH CAROLINA:

In the Supreme Court of the State of South Carolina.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in error.
vs.
VARNVILLE FURNITURE COMPANY, Defendant in error.

Citation.

The President of the United States to Varnville Furniture Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C. within thirty days from the date hereof, pursuant to a wit of

error filed in the Clerk's Office of the Supreme Court of the State of South Carolina wherein the Charleston and Western Carolina Railway Company, defendant, is appellant and you are plaintiff, respondent, to show cause, if any there be, why the judgment rendered against the said Charleston and Western Carolina Railway Company, Appellant, as in said write mentioned, should not be corrected and why speedy justice should not be done by the partues in that behalf.

Witness, the Honorable Eugene B. Gary Chief Justice of Supreme Court of the State of South Carolina this 3 day of October, in the year of Our Lord One Thousand Nine Hundred and Thirteen.

EUGENE B. GARY,
Chief Justice of South Carolina.

Service acknowledged of a copy of this citation this 7th day of October, 1913.

J. W. VINCENT,
Att'y for Varnville Furniture Company.

53 [Endorsed:] State of South Carolina. Charleston and Western Carolina Railway Company, Plaintiff in Error, vs. Varnville Furniture Company, Defendant in Error. Citation. Original. F. B. Grier, Att'y for Plaintiff in Error, Greenwood, S. C. Filed Supreme Court of S. C. Oct. 8 1913. U. R. Brooks, Clerk.

[Seal Supreme Court of South Carolina.]

54 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

VARNVILLE FURNITURE COMPANY, Plaintiff-Respondent,
vs.
CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Defendant-Appellant.

Bond on Writ of Error.

Know all men by these presents, that Charleston and Western Carolina Railway Company, a corporation chartered and organized under the Laws of the State of South Carolina, and Fidelity and Deposit Company of Maryland, surety, are held and firmly bound unto Varnville Furniture Company in the sum of Five Hundred Dollars to be paid to the obligee, herein; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns firmly by these presents.

Sealed with our Seals and dated this 3rd day of October, 1913.

Whereas the above named Charleston and Western Carolina Railway Company, hath prosecuted a writ of error from the Supreme

Court of the United States to reverse the judgment rendered by the Supreme Court of South Carolina in the case of Varnville Furniture Company, plaintiff-respondent, against Charleston and Western Carolina Railway Company, defendant-appellant:

Now, therefore, the condition of this obligation is such that if the above named Charleston and Western Carolina Railway Company shall prosecute its said writ of error to effect, and if it fail to make its claim good, answer all damages and costs, then this obligation shall be void; otherwise the same shall be and remain in full force.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY,
By J. W. LIGON, *Agent.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By J. E. CRYMES,
Att'y in Fact.

In the presence of—
MARY LUTTRELL.

Approved:
EUGENE B. GARY,
Chief Justice Supreme Court of South Carolina.

[Seal Supreme Court of South Carolina.]

We admit service of copy of within Bond this 7th day of October, 1913.

J. W. VINCENT,
Attorneys for Varnville Furniture Company.

A true copy.

U. R. BROOKS, *Clerk.*

55 [Endorsed:] State of South Carolina. Varnville Furniture Company, Plaintiff-Respondent, vs. Charleston and Western Carolina Railway Company. Bond on Writ of Error. Copy. F. B. Grier, Att'y, Plaintiff-Respondent, Greenwood, S. C.

56 STATE OF SOUTH CAROLINA,

In the Supreme Court.

VARNVILLE FURNITURE COMPANY, Plaintiff-Respondent,
vs.
CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, Defendant-Appellant.

I, U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina pursuant to a Writ of Error and by way of Return thereto, directed to said Supreme Court of South Carolina by the Supreme Court of the United States in the above entitled cause, and

in obedience to the command of such writ, do herewith transmit under my hand and seal to the Supreme Court of the United States, a duly certified transcript of the record and of all proceedings in the case in the above entitled cause, and the assignments of errors and petition for writ of error, together with true copies of all opinions filed in the case, together with the original writ of error and citation, with acceptance of service thereof, and I hereby certify that the record herewith transmitted is complete containing in itself and not be reference, all papers, exhibits, depositions and other proceedings necessary to the hearing of said case in the Supreme Court of the United States, and I do further transmit as a part of the record a true copy of sections 2573 and 2572 Civil Code of Laws, 1912, of the State of South Carolina, which said section 2573 is referred to in the opinion herein and is allowed to be sent up as a part of the record by the Honorable, Eugen B. Gary, Chief Justice of the Supreme Court of South Carolina.

Witness my hand and the seal of the Supreme Court of the State of South Carolina this 8 day of October, 1913.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

Endorsed on cover: File No. 23,894. South Carolina Supreme Court. Term No. 273. Charleston & Western Carolina Railway Company, plaintiff in error, vs. Varnville Furniture Company. Filed October 13th, 1913. File No. 23,894.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 272.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, PLAINTIFF IN ERROR.

against

VARNVILLE FURNITURE COMPANY,

DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

F. B. GRIER, ATTORNEY FOR PLAINTIFF IN ERROR.

STATEMENT OF FACT.

The defendant in error, (plaintiff below), brought suit in the Magistrate's Court, Hampton County, South Carolina, on the 23rd day of August, 1912, against Charleston & Western Carolina Railway Company, plaintiff in error, (Defendant below), to recover $14.75 alleged damage to a shipment of furniture from High Point, North Carolina, to Varnville, South Carolina, and for $5.25 alleged overcharge on said shipment, and for a penalty of $50.00 for failure to pay the claim within forty days.

The Southern Railway Company received the shipment at High Point, North Carolina, to be transported over its line and connecting lines to Varnville, South Carolina, and issued its usual bill of lading therefor. The defendant in error was the consignee and holder of the bill of lading, the shipment was to be delievred to it at Varnville, South Carolina, (R. 13.) Plaintiff in error received the shipment from the Southern Railway Company at Allendale, S. C., and delivered same to the defendant in error at destination, on or about the 25th day of March, 1912, in a damaged condition. There was no

testimony tending to show where or how the damage occurred, and no testimony to show that it was in good condition when received. Claim was filed by defendant in error on the 18th day of June, 1912, with the agent of plaintiff in error at destination in the sum of $14.75 on account of injury to the furniture, and $4.60 overcharge in freight. The claim was not paid and suit was brought to recover the amount of alleged damage and overcharge, and in addition a penalty of $50.00 for failure to adjust and pay the claim within 40 days, as provided by the South Carolina Statute, Civil Code 1912, Section 2573.

Plaintiff in error demurred to the cause of action asking for a penalty, on grounds which appear at R. 4. The Magistrate overruled the demurrer, and answer was filed denying the other allegations of the complaint. On the trial of the case, the testimony for the defendant in error tended to establish the fact that the furniture was damaged to the extent of $14.75, but no attempt was made to show where or how the damage occurred, or that it was received in good condition. The claim for overcharge in freight was arrived at by undertaking to show that the actual weight of the shipment was some 700 pounds less than the weight called for in the bill of lading. (R. 5.) The testimony of plaintiff in error tended to show that the weights called for in the bill of lading were correct and had been tested by the Southern Weighing and Inspection Bureau at High Point, N. C. (R. 8.) The judgment of the Magistrate was for the full amount of the claim as filed and for the penalty of $50.00. An appeal was taken from the judgment of the Magistrate to the Court of Common Pleas in and for the County of Hampton, on grounds which appear at R. 9. On the hearing of the appeal the Presiding Judge affirmed the judgment of the Magistrate and dismissed the appeal.

From this judgment the plaintiff in error appealed to the Supdeme Court of the State of South Carolina, on exceptions which appear at R. 11 and 12, being the Court of last resort in the said State for the hearing of the appeal. The Supreme Court of South Carolina rendered its decision affirming the judgment—a dissenting opinion being written by Mr. Associate Justice Watts. (R. 14 to 35, inclusive). Final judgment was thereupon duly entered against the plaintiff in error for the full amount of the claim and penalty of $50.00.

The following is a copy of the Statute.

"2573. FREIGHT ADJUSTMENTS TO BE "MADE IN CERTAIN TIME.—Every claim for "freight overcharge or for loss of or damage to prop- "erty and baggage, while in the possession of such "common carrier, shall be adjusted and paid within

"thirty (30) days in case of shipments wholly with-
"in this State and within forty (40) days in case of
"shipments from without this State, after the filing
"of such claim with the agent of such carrier at the
"point of destination of such shipment; when there
"is no agent at such point, then such claim to be
"filed with the agent at the nearest station to such
"point of destination having an agent: Provided,
"That no such claim shall be filed until after the ar-
"rival of the shipment, or of some part thereof, at
"the point of destination, or until after the lapse of
"a reasonable time for the arrival thereof. In every
"case such common carrier shall be liable for the
"amount of such loss or damage, together with inter-
"est thereon from the date of the filing of the claim
"therefor until the payment thereof. Failure to ad-
"just and pay such claim within the periods respect-
"ively herein prescribed shall subject each common
"carrier so failing to a penalty of fifty dollars for
"each and every such failure, to be recovered by any
"consignee or consignees aggrieved in any court of
"competent jurisdiction: Provided, That unless such
"consignee or consignees recover in such action the
"full amount claimed no penalty shall be recovered,
"but only the actual amount of the loss or damage,
"with interest as aforesaid: Provided, further, That
"no common carrier shall be liable under this Sec-
"tion for property which never came into its posses-
"sion if it complies with the provisions of Section
"2572."

Section 2572 is closely connected with the foregoing Section and we copy it herewith:

"2572—RESPONSIBILITY OF CARRIERS UN-
"DER CERTAIN CONTRACTS—LOSS OR DAM-
"AGE TO BE ADJUSTED.—FINE.—In every case
"of loss, damage, destruction or failure to deliver
"any property by a common carrier shipped over its
"line or any connecting line, it shall be the duty of
"the initial, every intermediate and terminal car-
"rier, upon notice of such loss, damage, destruction
"or failure to deliver out within forty days or to
"trace such property lost, damaged or destroyed
"and inform the said party so notifying when,
"where and by which carrier the said property was
"lost, damaged or destroyed within said forty
"days. Every carrier, failing or refusing to
"trace such property and inform the notifying
"party as above stated, within forty days after

"such notice, shall be liable for the full amount "of the claim for loss, damage, destruction, or failure "to deliver, in the same manner and to the same ex- "tent as if such loss, damage, destruction, or failure "to deliver occurred on its line, and, in addition "thereto, a penalty of fifty dollars, upon each claim, "to be recovered in any court of competent juris- "diction in the same action with the claim, or in a "separate action. The claimant shall also be entitled "to recover interest on his claim from the date of "filing same. If such initial, intermediate or ter- "minal carrier upon the trial of the case, shall prove "that it exercised due diligence and was unable to "trace the property and inform as above provided, "it shall thereupon be excused from liability under "this Section. This Section shall in no way repeal "any other provisions of this Chapter: Provided, "That only one penalty shall be recoverable upon "the same cause of action: And provided, further, "That the actions authorized hereunder may be com- "menced in any county in the State in which the car- "rier with which the claim is filed is engaged in "business."

ASSIGNMENTS OF ERROR.

(a) The Statute of South Carolina, Section 2573 of the Code of 1912, Volume 1, is a burden on and regulation of interstate commerce, and is in conflict with the due process clause and the equal protection clause of the Constitution of the United States.

(b) The Commerce Act of Congress, as amended by the Act of June 29th, 1906, is exclusive of all State legislation on or regulation of the subject of interstate commerce, and the South Carolina Penalty Statute, as applied to interstate commerce, is thereby annulled and rendered void.

(c) The Penalty Statute of South Carolina is in conflict with and repugnant to the Commerce Act of Congress as amended regulating interstate commerce.

PROPOSITIONS OF LAW.

1. The Penalty Act of South Carolina, codified as Section 2573, Code of 1912, Volume 1, as construed by the Supreme Court of the State, in this and other recent cases, makes the delivering carrier responsible for the delicts of the connecting carrier, resulting in loss or damage, to the lawful holder of the bill of lading, in a through shipment, although it may not as a matter of fact be the carrier at fault.

Varnville Fur. Co. vs. C. & W. C. Ry. Co., 98 S. C. 63;
Willet vs. Ry. Co., 66 S. C., 477.
Dupree vs C. N. & L. Ry. Co., 98 S. C., 468.
Eastover Mule and Horse Co. vs. A. C. L., 99 S. C. 457.

2. The subject of the Carmack Amendment is Carrier Liability for loss, damage or injury to property, caused by it, or by any connecting carrier to whom the property is delivered, or over whose line it may pass. It embraces the entire subject and covers every detail of carrier liability to the lawful holder of the bill of lading, which the receiving or initial carrier is required to issue.

Riverside Mills vs. A. C. L., 219 U. S. 186;
Express Company vs. Croniger, 226 U. S. 491.

3. The subject of the South Carolina Penalty Statute is Carrier Liability for freight overcharge, or for loss or damage to property and baggage while in possession of such common carrier. The penalty is automatic and is imposed by the terms of the Statute for a failure to pay the claim for loss or damage within the time specified by the Act. It grows out of and is founded on Carrier Liability for loss or damage sustained by the lawful holder of the bill of lading which the Act of Congress requires the carrier to issue. The subject matter of the Act as to the fundamental and only real question involved is identical with the subject matter of the Act of Congress.

Civil Code 1912, Volume 1, Sections 2573 *and* 2572.

4. The State of South Carolina has no inherent power to deal with this subject. Its power is permissive only and dependent upon non-action by Congress, and ceases to exist the moment that Congress asserts its paramount authority over the subject, which is of National scope and importance, and mitting of but one uniform system of regulations.

Missouri K. & T. R. Co. vs. Harris, 234 U. S. 412.
Southern Ry. Co. vs. Reid 222 U. S. 424.
Chicago, R. I. & P. R. Co. vs. Hardwick Farmers Elevator Company, 226 U. S. 426;
Express Co. vs. Corniger, 226 U. S. 491.
Chicago, R. I. & P. Ry. Co. vs. Cramer, 232 U. S. 490.
Atchison, T. & S. F. Ry. Co. vs. Robinson, 233 U. S. 173.

5. The South Carolina Penalty Statute was upheld on the theory that there was no federal legislation on the subject involved. The decisions held that the penalty imposed was for a delict of duty pertaining to the business of a common carrier, and in so far as it affected interstate commrce was an aid theerto by its tendency to promote safe and prompt delivery of the goods, or, its legal equivalent, prompt settlement of proper claim for damages.

Charles vs. Atlantic Coast Line, 78 S. C. 36;
Atlantic Coast Line vs. Mazursky, 216 U. S. 122;

The cause of action in these cases arose in 1905, and since then Congress has legislated on the subject. Hepburn Act, June 26, 1906, amending the Commerce Act; and the Mann-Elkins Act, June 18, 1910.

6. The Hepburn Act, amending the Commerce Act of Congress, has been construed by this Court to deny to the State the power of enforcing by statutory penalties the duty of receiving and prompt delivery of property in consummation of interstate transportation.

St. Louis, I. M. & S. R. Co. vs. Edwards, 227 U. S. 265.
Chicago, R. I. & P. R. Co. vs. Hardwick Farmers Elevator Company, 226 U. S. 426;
Southern Ry. Co. vs. Reid, 222 U. S. 424.

7. The Interstate Commerce Commission, pursuant to the powers conferred on the Commission by the Commerce Act of Congress, has assumed the regulation of the payment of claims for loss or damage and for overcharge of freight by carriers. Action by Congress or the Commission supercedes and annuls State regulation. It is not necessary that there be directly inhibitive Congressional legislation or conflicting regulation by the Commission, but Legislation by Congress, or regulation by the Commission, which occupies the field, excludes action by the State.

Northern Pac. Ry. vs. Washington, 222 U. S. 370;
Southern Ry. Co. vs. Reed, 222 U. S. 424;
Southern Ry Co. vs. Beam. 222 U. S. 444;
Conference Ruling No. 462, April 25, 1914;
Conference Ruling No. 464, May 28, 1914;
Conference Ruling No. 236.

8. Congress has legislated specifically with reference to freight overcharge, and the Interstate Commerce Commission under its delegated powers has assumd control of the subject. Sections 2, 8 and 9 of the Act of Congress to regulate Commerce.

Barnes Interstate Transportation, p. 600 Section 405-D and page 600 section 405-J—Lanning-Harris Coal & Grain Co. vs. St. L. & S. F. R. Co. 15 I. C. C. R.—37.

Leonard vs. N. K. T. R. Co. 12 I. C. C. R. 538.

ARGUMENT.

The purpose of this Writ is to test the validity of the Fifty Dollar Penalty Statute of the State of South Carolina, of February 15th, 1910, codified as Section 2573, Volume 1, Code of 1912, as applied to an interstate shipment, considered in

connection with the Commerce Act of Congress, as amended by the Hepburn Act of June 29th, 1906, and the Mann-Elkins Act of June 18th, 1910, and particularly with reference to the Act of June 29th, 1906, commonly known as the Carmack Amendment.

The South Carolina Penalty Statute of 1903 was before this Court in the case of Atlantic Coast Line vs. Mazursky, in which the Statute was upheld. 216 U. S. 121. The Statute was construed as only concerning property lost or damaged *while in the possession of the carrier in the State of South Carolina.* Its constitutionality was assailed on the ground that it was an illegal regulation of and burden on interstate commerce. The Court held that the Statute, when construed as applying to a loss or damage *while in the possession of the carrier, in the State of South Carolina,* was not an unlawful interference with interstate commerce as applied to an interstate shipment; that the Statute was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to its business as a common carrier of freight; that the penalty imposed was for a delict of duty pertaining to the business of a common carrier, and in so far as it affected interstate commerce, was an aid thereto by its tendency *to promote safe and prompt delivery of goods, or its legal equivalent, prompt settlement of proper claim for damages.* The cause of action in the Mazursky case arose in 1905. See Transcript of Record No. 254, October Term, 1908. There was at that time no federal legislation on the subject involved, and the decision proceeded on the thory that the case fell within that class, where, from the nature of the subject, the State might exert its authority until Congress acted, on the assumption that Congress by inaction tacitly authorized the exercise by the State of this permissive power. This is the construction placed on the decision by this Court wherever referred to or cited. In the very recent case of *Misouri, K. & T. vs. Harris,* 234 U. S. 416, Mr. Justice Pitney, in discussing the Texas statute allowing Attorneys' fees by way of costs on small claims, in referring to the Mazursky case, supra, brings out clearly this idea. He states that the Penalty Statute before the Court in the Mazursky case:

> "....was not an unwarrantable interference with "interstate commerce, *in the absence of legislation "by Congress,* but was rather a regulataion in aid of "the performance by the carrier of its legal duty." (italics ours.)

If there has been no legislation on this subject, or regulation by the Interstate Commerce Commission, then the Ma-

zursky Case is controlling, and the questions which we raise are admitted to be foreclosed against us.

The fact that the Commerce Act was amended in 1906 and again in 1910, in important particulars(can not be questioned. The scope and far-reaching effect of these amendments is difficult to define. The Hepburn Act of June 26, 1906, amending Section 20 of the Commerce Act, commonly designated as the Carmack Amendment, is the one on which we mainly rely. Although, the Amendment of the same date to Section 1 of the same Act, defining "transportation," and the Mann-Elkins Act of June 18th, 1910, further amending the same Section, *outlining and defining the duty* of a carrier to furnish proper facilities for *receiving freight, and requiring it to make prompt delivery of freight tendered for transportation,* are perhaps quite as important in their bearing on the question at issue.

The following is a copy of the Carmack Amendment:

"That any common carrier, railroad or trans-por-
"tation company receiving property for tansporta-
"tion from a point in one State to a point in an-
"other State shall issue a receipt or bill of lading
"therefor and shall be liable to the lawful holder
"thereof for any loss, damage or injury to such
"property caused by it or by any common carrier,
"railroad or transportation company to which such
"property may be delivered, or over whose line or
"lines such property may pass, and no contract, re-
"ceipt, rule or regulation shall exempt such com-
"mon carrier, railroad or transportation company
"from the liability hereby imposed: Provided, that
"nothing in this section shall deprive any holder of
"such receipt or bill of lading of any remedy or right
"of action which he has under existing law.

"That the common carrier, railroad or transporta-
"tion company issuing such receipt or bill of lading
"shall be entitled to recover from the common car-
"rier, railroad or transportation company on whose
"line the loss, damage or injury shall have been sus-
"tained, the amount of such loss, damage or injury
"as it may be required to pay to the owners of such
"property, as may be evidenced by any receipt, judg-
"ment, or transcript thereof."

The Act came before the Court for the first time in the case of *A. C. L. vs. Riverside Mills,* 219 U. S. 186, (55 L. Ed. 167). The goods of the defendant had been lost by a connecting carrier to whom they had been safely delivered by the initial carrier, A. C. L. The bill of lading contained the usual clause

or provision exempting it from liability beyond its own line. It was conceded by the Court that at common law under the facts stated, the initial carrier would not be liable for the loss due to the fault of connecting carrier to whom it had safely delivered the goods for further transportation. In this connection the Court held at page 178:

> "Liability is confessedly dependent upon the pro-
> "vision of the act of Congress regulating commerce
> "between the States, known as the Carmack Amend-
> "ment of June 29th, 1906.
>
> "The undisputable effect of the Carmack Amend-
> "ment is to hold the initial carrier engaged in inter-
> "state commerce and 'receiving property for trans-
> "portation from a point in one State to a point in
> "another State,' as having contracted for through
> "carriage to the point of destination, using the lines
> "of connecting carriers as its agents."

And again at page 181:

> "Reduced to the final results, the Congress has
> "said that a receiving carrier, in spite of any stipu-
> "lation to the contrary, shall be deemed, when it
> "received property in one State, to be transported to
> "a point in another, involving the use of a connecting
> "carrier for some part of the way, to have adopted
> "such other carrier as its agent, and to incur carrier
> "liability throughout the entire route, with the right
> "to reimbursement for a loss not due to his own neg-
> "ligence."

And again at page 182:

> "In substance Congress has said to such carriers:
> "'If you receive articles for transportation from a
> "point in one state to a place in another, beyond your
> "own terminal, you must do so under a contract to
> "transport to the place designated. If you are obliged
> "to use the services of the independent carriers in
> "the continuance of the transit, you must use them as
> "your own agents, and not as agents of the ship-
> "per.'"

It thus appears that the Act as construed by the Court in this case, was intended to bring about very radical changes:

(a) It deprives the carrier of the right which it had at common law to limit its responsibility to its own line.

(b) It creates a right of action in favor of the shipper or lawful holder of bill of lading against the initial carrier, regardless of whether the initial carrier was the one at fault.

(c) It imposes carrier liability on the initial road throughout the entire route.

(d) It gives a remedy to the lawful holder of bill of lading for loss or damage against the initial carrier.

(e) This right of action and remedy is entirely a creature of statute. The shipper or holder of bill of lading may successfully maintain his action against the initial carrier, although it may be admitted in the record that the default occurred with the connecting line.

(f) It gives a right of action to the initial carrier against the defaulting connecting or delivering carrier, but there is no right of action given to the connecting carrier by the statute as against any intermediate defaulting carrier. The scheme outlined by the act is such as to place primary liability on the initial carrier in all cases, with the corresponding right of the initial carrier against the succeeding defaulting carrier, whether intermdeiate or terminal. It deprives the carrier of the right to choose the line over which the shipment may move. The right to route the shipment is given to the shipper by other sections of the act.

These are some of the changes brought about by the Amendment, important to know in connection with the question at issue, and, we submit, are sufficient to demonstrate that the penalty statute of South Carolina is no longer of force.

In the first place, the South Carolina Penalty Statute not only authorizes, but *requires,* suit to be brought against the terminal carrier. Claim must be filed with the terminal carrier at the point of destination. And then if not paid within forty days thereafter, the suit may be brought, and, in order to recover the penalty, must be brought against the terminal carrier. A judgment *for the full amount of the claim filed, against the terminal carrier,* is necesasry to the recovery of the penalty. The penalty is automatic. The only question at issue is the extent of loss or damage or freight overcharge. It allows interest on the claim from the date of filing. (The legal rate in South Carolina is seven per cent.) It gives the right of action to the *consignee* or *consignees* aggrieved. The consignee may not as a matter of fact be the lawful holder of the bill of lading. Judgement must be *for the full amount of the claim as filed,* or no penalty can attach; but, even then, plaintiff is entitled to a judgment for the actual amount of loss or damage, with interest at seven per cent. It is provided that the carrier shall not be liable under this section for property which did not come into its possession, if it complies with the provisions of Section 2572. See Section 2573, Code of 1912.

Section 2572, referred to, which is construed by our Court in connection with Section 2573, provides among other things that in every case of loss, damage, destruction or failure to

deliver any property by a common carrier, shipped over its line or connecting line, that it shall be the duty of the initial, intermediate and terminal carrier, upon notice, to inform the party giving notice, when, where and by what carrier the property lost was damaged or destroyed, within forty days after notice, and failing or refusing to trace and inform the party within forty days, is made liable for the full amount of the claim to the same extent as if it occured on its own line, and in addition a penalty of Fifty Dollars. The claimant is allowed interest from date of filing, at seven per cent. If the carrier can *prove on the trial of the case* that it exercised due diligence *and was unable to trace the property,* it is excused. This is the only way it can be exempt from liability. It requires that the proof be made on the trial of the case, and not only must it prove that it exercised due diligence, but must go further and show by proof *that it was unable to comply with the statute.*

This is a decided change in the law of South Carolina, as it stood in 1903, when the Act was first before this Court for construction. The Penalty Statute of 1903 contained a proviso somewhat similar; that is to say, it provided that the carrier would not be liable for property which had come into its possession, if it complied with the provisions of Section 1710, Volume 1, of the Code of 1902. The Court, in construing this, held that the Act imposed no liability to which the proviso could be applied, but limited it to property lost or damaged in the possession of the carrier. Section 1710 of the Code of 1902 was entirely different from Section 2572 of the Code of 1912. In the first place, Section 1710 referred to a contract of shipment over two or more lines, where the responsibility of each terminated on the delivery to the connecting line "in good order." Our Court strictly confined the Section to a contract of this kind. See Cave vs. C. &. M. Ry. Co., 53 S. C. 496. It only applied to the initial or delivering road. It had no penalty feature whatever, and did not require the carrier to show that it was umable to trace the shipment, but only required that it show due diligence in undertaking to do so. This section, 1710 of the Code of 1902, was amended by the Act of February 15th, 1910, and as amended is codified as Section 2572 of the Code of 1912. It is thus apparent that decided changes have been brought about in the South Carolina Penalty Statute by these amendments. And the decisions of the Court of South Carolina have, of course, correspondingly changed. The scope of the amendment to Section 1710 of the Code of 1902 entirely changes that Section by striking out so much of it as limited its application to contracts of the character referred to in the Cave Case; and it now applies to

all cases where property is delivered to a carrier for shipment over its own or connecting line.

A delivering carrier handling a shipment moving over several lines is forced to pay a claim for loss or damage, although the loss may not as a matter of fact have occured on its own line, if it fails to comply with the provisions of this last named section as to giving notice of when and where the loss occured; and this does not excuse it, because it must go further and on the trial of the case prove to the satisfaction of a jury that it used all due diligence to ascertain this information, and further that it *was able to trace the property.* It can be readily seen that it is a practicable impossibility for a carrier to comply with the requirements of this Section, and the result is in all cases the imposition of a penalty, where the amount of the claim as filed is established by the verdict of a jury. It seems to us that this new element injected in the Penalty Statute by these recent Amendments, places it in the same class as the Georgia Statute, condemned by this Court in ths case of Central Railroad Company vs. Murphy, 196 U. S. 194.

In the instant case, there is not a practicle of testimony even tending to show that the loss and damage occurred on the line of plaintiff in error, the delivering carrier. It was not considered of sufficient importance to be an element in the cause of action. Defendant in error was content to show that the property was delivered in a damaged condition, although it appeared to have passed over other lines in transit. It was a carload shipment, and plaintiff in error moved it only a short distance, to-wit, from Allendale, S. C., to Varnville, S. C. There was no testimony tending to show that it was received in good condition. It had moved from a point in North Carolina through the State of North Carolina and through the greater part of the State of South Carolin, before reaching the line of the plaintiff in error. The trial record shows that there was not even a suggestion to indicate, where, how or when the damage occurred, and the decision of the Supreme Court of South Carolina merely states that it was delivered in a damaged condition. It was impossible for plaintiff in error to show where the furniture was really damaged, for the obvious reason that it was a carload shipment moving under original seals. The Carmack Amendment covers this exact situation. It gives the holder of the bill of lading a certain, sure and speedy remedy against the initial line, with the corresponding right to the initial line of recovery against the carrier at fault.

In a very recent case by the Supreme Court of South Carolina, *Dupre vs. C. N. & L. Ry.*, 98 S. C. 468, the Supreme

Court of South Carolina had before it an action brought against the terminal carrier of an interstate shipment to recover a penalty for failure to pay the damages to a shipment, or to trace it and inform the consignee when, where and by which carrier it was damaged, within forty days after notice, under the terms of Section 2572. The opinion is short and we quote it in full:

"March 10, 1913.

"The opinion of the Court was delivered by Mr. "Justice Hydrick.

"This action was brought against the defendant, "the terminal carrier of an interstate shipment, to "recover the penalty provided by statute (26 Stat. "717, Civ. Code 1912, Sec. 2572) for failure to pay "the damages to a shipment, or trace it, and inform "the consignee when, where, and by which carrier it "was damaged, within forty days after notice there- "of. Defendant admits liability for the penalty, if "the statute imposing it is not in conflict with the "federal statute regulating interstate commerce.

"In *Meetze vs. Southern Express Company*, 81 S. "Co. 379, 74 S. E. 823, it was held that, as to initial "carriers of interstate commerce, the state statute "was superseded by the federal statute, because the "purpose of the state statute was to find out which "carrier was liable, and the federal statute answers "that question as to initial carriers by making them "liable at all events. The same reasoning, however, "does not apply when it is sought to enforce the state "statute against intermediate or terminal carriers, "because their liablity to the owner of the goods is "not affected by the federal statute. The proviso to "the Carmack Amendment reads: 'That nothing in "this section shall deprive any holder of such receipt "or bill of lading of any remedy or right of action "which he has under existing law.' If, therefore, the "owner finds it to his advantage, to pursue the car- "rier who actually lost or damaged the goods, the "same not being the initial carrier, it is as necessary "now as it was at the time of the adoption of the "Carmack Amendment, that he have the information "which the statute requires the carriers to furnish, "which they can easily and readily do. The fed- "eral statute does not cover the same field as the state "statute, when applied to intermediate or terminal "carriers; and therefore as to these there is no con- "flict.

"It has been settled by repeated decisions of this "Court and of the Supreme Court of the United "States that statutes like this are within the power of "the State, *in the absence of federal legislation on the "same subject. Winslow vs. Railroad Company,* 79 S. "C. 344, 60 S. E. 709, and cases cited; *Richmond & "Co. vs. Patterson Tobacco Co.,* 169 U. S. 311, 18 "Sup. Ct. 335, 42 L. Ed. 759; *Atlantic C. L. R. Com-"pany vs. Mazursky,* 216 U. S. 122, 30 Sup. Ct. 378, "54 L. Ed. 11.

"Affirmed."

In this Dupre case, supra, which is one of the latest decisions on the subject, we have the Supreme Court of the State holding that if the owner finds it to his advantage to bring suit against the carrier causing the loss, although it may not be the initial carrier, that it is just as necessary as it was at the time of the adoption of the Carmack Amendment to be furnished with the information required by Section 2572, to-wit, when, where and by what carrier the loss was occasioned. This decision clearly shows the practical effect and operation of these two sections of the State statute as construed and applied by the State Supreme Court. We also call especial attention to the fact that in the Dupre case the suit was brought for a failure to pay the claim, *or trace and give the information required by the statute.* In the instant case there was no testimony tending to show where the loss occurred, but the carrier did not comply with the provisions of Section 2572 as to tracing and giving notice, etc. In the Dupre case, supra, the Court holds that this is absolutely necessary in order to escape liability.

It is not, however, necessary to consider the two Sections together, in order to show that Congress has legislated on the subject covered by Section 2573. The subject matter of the Carmack Amendment is Carrier Liability for Loss or Damage in a through shipment to the lawful holder of the bill of lading, which the initial carrier is required to issue. The subject matter of the South Carolina Penalty Statute is Lsos or Damage, under identically the same conditions as covered by the Act of Congress. The only question litigated or at issue under the Penalty Statute is the amount of loss or damage, and when this is fixed, the penalty applies by virtue of the terms of the Statute. The initial carrier under the Carmack Amendment is made responsible to the full extent of the loss, but not otherwise. It has a right of action against the carrier really causing the loss. The delivering carrier under the South Carolina Statute, in addition to the amount of loss and damage is also required to pay Fifty Dollars by way of pen-

alty. It has no redress whatever against any carrier to recover this penalty. If the Penalty Statute is upheld, then a shipper may bring a suit under the Carmack Amendment against the initial carrier for the loss and damage sustained, and at the same time a suit in South Carolina against the delivering carrier for the loss and damage and for a penalty of Fifty Dollars. To illustrate, a shipment originating in the State of Oregon is consigned to a merchant of Columbia, S. C., and in transit loss and damage is sustained. The shipment moves under original seals and is not opened or examined en route, but is delivered in a damaged condition occurring somewhere en route. Under the Carmack Amendment, the initial carrier is absolutely and certainly liable to the lawful holder of the bill of lading, and the Columbia consignee, if the owner of the bill of lading, could proceed against the initial carrier in the State of Oregon to recover under the terms of the Act of Congress. It would only be necessary for him to show the extent of the loss, to be entitled to a verdict for the full amount of damage done. This same consignee at the same time could proceed in the Courts of South Carolina against the delivering carrier for the amount of loss and damage, and in addition a penalty of Fifty Dollars. It would certainly not be necessary to furnish more proof than was done in the instant case, which has been approved by the Supreme Court of the State of South Carolina, and when it appeared that the shipment was delivered in a damaged condition, he would be entitled to a verdict for the full amount of the damage sustained. The penalty would of course automatically attach. To prevent double recovery, the carrier would be forced to defend both suits, and after judgment in one jurisdiction could bring it to the attention of the Court in the other by some proper proceeding. The pending suit in South Carolina would not abate the suit in Oregon. Nor would the pendency of the suit in Oregon be a proper plea in abatement to the suit in South Carolina.

Can it be seriously suggested that the Act of Congress contemplated a condition of this kind?

It is not only possible, but very probable, if the South Carolina Statute has the force of law.

In order to prevent a possibility of this kind, it is necessary to construe the Act of Congress as exclusive of all State legislation on the subject. The Act is in derogation of the common law in so far as it gives a right of action against the initial line, and to carry out the manifest purpose and scehme contemplated by the Act, it seems to us necessary to consider it as exclusive of all State legislation on the subject of carrier liability.

When so considered, all parts of the Act co-ordinate and the shipper is given a certain and sure remedy for any loss or damage sustained. He prosecutes his suit against the initial carrier, and is only required to show that he sustained loss or damage, and is not concerned with where it occurred and how it occurred. Under the terms of the Act as thus construe, a shipper of vegetables from a South Carolina point North is only required to show that he made delivery to the initial road in good order, and that the shipment when delivered at the end of the journey was damaged. He has a plain and sure remedy against the initial road. It is no defense for the initial road to show that so far as it was concerned the shipment was promptly and safely handled and delivered in perfect condition to its connecting line. Under the terms of the Act its liability is complete, so far as the shipper is concerned, it must pay the judgment and look to the connecting roads really at fault for reimbursement. This is certainly a great relief and benefit to all outgoing shipments, and it is just as perfect as to incoming shipments. We submit that it would be unreasonable and a great hardship on the railroads in South Carolina to allow a shipper on his outgoing freight to bring suit against them without any wrong whatever, as the initial carrier, under the terms of the Act of Congress and at the same time permit a suit against them as terminal carriers under the South Carolina Act on incoming shipments, for damages, interest and penalty.

If the Act of Congress is construed to be exclusive, the Penalty Statute of South Carolina is, of course, no longer of force.

In the case of *Mondu vs. N. Y. N. H. & H. R. R. Co.*, 223 U. S. 1, this Court held that the Employers Liability Act was exclusive of all State law on the subject. We quote the following from that decision:

> "It follows that any Legislation of a State, al-
> "though in pursuance of an acknowledged power, re-
> "served to it, which conflicts with the actual exercise
> "of the power of Congress over the subject of Com-
> "merce, must give way before the supremacy of the
> "national authority.
>
> "True, prior to the present Act, the laws of the
> "several States where regarded as determinative of
> "the liability of employers engaged in interstate com-
> "merce for injuries received by their employees while
> "engaged in such work. But that was because Con-
> "gress, although empowered to regulate that subject,
> "has not acted thereon, and because the subject is one
> "which falls within the police power of the States in
> "the absence of action by Congress."

It must be admitted that the penalty statute does affect interstate commerce. The interstate commerce Act embraces all of the means, ways, regulations and instrumentalities by which commerce is carried on. Our Court in upholding the validity of the Statute, placed its decisions on the ground that the penalty Act was not a burden on interstate commerce, but was an aid to it. It was never suggested that it did not affect interstate commerce, and we assume that this proposition will be admitted. For instance, in the case of *Charles vs. Railway*, 78 S. C.,....., the Court used this language:

> "While it is not easy to define the exact limits of "the operation of State laws as affecting interstate "commerce, we have no hesitation in saying that the "statute in question, as it affects carriers doing bus- "iness in this State, who fail or refuse to adjust and "pay the loss of or damage to goods while in their "possession, is no unlawful interference with inter- "state commerce, even as applied to an interstate "shipment. The penalty imposed is for a delict of "duty appertaining to the business of a common car- "rier, and in so far as it may affect interstate com- "merce, it is an aid thereto by its tendency to pro- "mote safe and prompt delivery of goods, or its legal "equivalent—prompt settlement of proper claim for "damages."

This admits and concedes that the Act does affect interstate commerce, but holds that it is not harmful, or an unlawful interference; that it is an aid to interstate commerce in that it tends to promote safe and prompt handling. It was on this theory that the Supreme Court of the United States concurred in upholding the decisions of the State Court. All of these decisions were on causes of action which arose prior to the Carmack Amendment, and so far as we know the question is for the first time presented as to the effect of this amendment on the penalty statute. As was said by the Court in the Mondou case, supra:

> "Any legislation of a State, although in pursuance "of an acknowledged power reserved to it, which "conflicts with the actual exercise of the power of "Congress over the subject of commerce, must give "way before the supremacy of the national author- "ity."

It may be suggested that the panalty statute is designed to require the performance of a duty which exists independently of the Act. In other words, it is the duty of the carrier to make prompt payment of its claims, and the Act imposing a penalty for violation of this duty, to that extent is helpful

in its operation and effect, thereby tending to a more prompt delivery and handling of the traffic. The Court seems to construe these terms as synonomous. We quote from the decision of the U. S. Supreme Court in the case of *A. C. L. vs. Mazursky*, 54 Law. Ed. 417:

> "The penalty imposed is for the delict of duty ap-
> "pertaining to the business of a common carrier,
> "and in so far as it may affect interstate commerce,
> "it is an aid thereto by its tendency to promote safe
> "and prompt delivery of goods, or its legal equiva-
> "lent—and prompt settlement of proper claim for
> "damages."

This shows conclusively that the penalty statute has been regarded by both the State and Federal Court as affecting interstate commerce, but both Courts uphold the Act on the theory that it was an aid thereto and not a burden or harmful regulation. We submit that since Congress has legislated on this subject, all State legislation is thereby rendered void, irrespective of the question whether, admittedly affecting such commerce, it be an aid or not.

In the case of *Adams Express Company vs. Croninger*, decided by the Supreme Court of the United State on January 6th, 1913, 226 U. S. 491, the Court has before it for consideration the effect of the Carmack Amendment as applied to interstate commerce. We shall quote from the decision at length:

> "The question upon which the case must turn, is,
> "whether the operation and effect of the contract for
> "an interstate shipment, as shown by the receipt or
> "bill of lading, is governed by the local law of the State
> "or by the Acts of Congress regulating interstate
> "commerce.
>
> "That the constitutional power of congress to
> "regulate commerce among the States and with for-
> "eign nations comprehends power to regulate con-
> "tracts between the shipper and the carrier of an in-
> "terstate shipment by defining the liability of the
> "carrier for loss, delay, injury or damage to such
> "property, needs neither argument nor citation of
> "authority.
>
> "But it is equally well settled that until Congress
> "has legislated upon the subject, the liability of such
> "a carrier, exercising its calling within a particular
> "State, although engaged in the business of inter-
> "state commerce, for loss or damage to such prop-
> "erty, may be regulated by the law of the State.
> "Such regulations would fall within that large class

"of regulations which it is competent for a State to "make in the absence of legislation by Congress, "growing out of the territorial jurisdiction of the "State over such carriers and its duty and power to "safeguard the general public against acts of mis- "feasance and non-feasance committed within its "limits, although interstate commerce may be indi- "rectly affected. (Citing authorities.) In the Solan "case, cited, it was said of such State legislation:

" 'They are not, in themselves, regulations of inter- "state commerce, although they control in some de- "gree, the conduct and the liability of those engaged "in such commerce. So long as Congress has not "legislated upon the particular subject, they are "rather to be regarded as legisation in aid of such "commerce and as a rightful exercise of the police "power of the State to regulate the relative rights "and duties of all persons and corporations within "its limits.' "

"That the legislation supersedes all the regula- "tions and policies of a particular state upon the same "subject results from its general character. It em- "braces the subject of the liability of the carrier "under a bill of lading which he must issue and lim- "its his power to exempt himself by rule, regulation "or contract. Almost every detail of the subject is "covered so completely that there can be no rational "doubt but that Congress intended to take posession "of the subject and supersede all state regulation "with reference to it. Only the silence of Congress "authorized the existence of the police power of the "state upon the subject of such contracts. But when "Congress acted in such a way as to manifest a "purpose to exercise its conceded authority, the reg- "ulating power of the state ceased to exist.

"To hold that the liability therein declared may "be increased or diminished by local regulation or "local views of public policy will either make the "provision less than supreme or indicate that Con- "gress has not shown a purpose to take possession of "the subject.

"The first would be unthinkable, and the latter "would be to revert to the uncertainties and diver- "sities of rulings, which led to the amendment. The "duty to issue a bill of lading and the liability there- "by assumed are covered in full, and though there "is no reference to the effect upon State regulation,

"it is evident that Congress intended to adopt a "uniform rule and relieve such contracts from the "diverse regulation to which they had been there-"tofore subject.

"What is the liability imposed upon the carrier? "It is a liability to any holder of the bill of lading "which the primary carrier is required to issue 'for "any loss, damage or injury to such property caus-"ed by it' or by any connecting carrier to whom the "goods are delivered.

"But it has been argued that the non-exclusive "character of this regulation is manifested by the "provision of the section, and that state legislation "upon the same subject is not superseded, and that "the holder of any such bill of lading may resort "to any right of action against such a carrier con-"ferred by existing state law. This view is unten-"able. It would result in the nullification of the "regulation of a national subject and operate to "maintain the confusion of the diverse regulation "which it was the purpose of Congress to put an "end to.

"To construe this proviso as preserving to the "holder of any such bill of lading any right or rem-"edy which he may have had under existing Fed-"eral law at the time of his action, gives to it a "more rational interpretation than one which would "preserve rights and remedies under existing laws, "for the latter view would cause the proviso to de-"stroy the act itself."

In the case of Southern Railway vs. Reid, 222 U. S. 424, 56 Law Ed. 257, the Court among other things said:

"As to the extent of the power and the occasions "for its exercise, controversies have arisen and in "deciding which the power of the State over the gen-"eral subject of commerce has been divided into "three classes: First, those in which the power of "the state is exclusive; second, *those in which the "states may act in the absence of legislation by Con-"gress;* third, *those in which the action of Congress "is exclusive and the state cannot act at all;* (Italics "ours). *Covington & Co., Bridge Co., vs. Kentucky* "154 U. S. 209, 38 L. Ed. 965, 4 Inters. Com. Rep. "649, 14 Sup. Ct. Rep. 1087; *Western U. Tel. Co. "vs. James,* 162 U. S. 650, 655, 40 L. Ed. 1105, 106, 16 "Sup. Ct. Rep. 934.

"These divisions, however, express but the ex-
"treme boundaries of the subject. Something more
"definite is necessary for the decision of the oppos-
"ing contentions in the case at bar. The Supreme
"Court of the State was of the view that the Statute
"simply regulated a duty which preceded the entry
"of the goods in interstate commerce, and concluded,
"therefore, that the statute was 'neither an interfer-
"ence with nor a burden upon interstate commerce.'
"And it decided that the execution of this duty was
"not precluded by the provision of the interstate com-
"merce act (24 Stat. at L. 379, Chap. 104, U. S. Comp.
"Stat. 1901, p. 3164), requiring a schedule of tariffs
"to be established and charged. It was said by the
"Court that it was the duty of the railway to file such
"schedule, and that the company could not justify
"the violation of its common law duty by the neg-
"lect of its statutory duty.

"The case, however, is not quite in such narrow
"compass. There is something more to be consid-
"ered than the accumulation of defaults, if there be
"defaults. It is undoubtedly the duty of a railway
"company, to receive freight when tendered for
"transportation. It may, besides, have other obli-
"gations, but it does not follow that it is within the
"power of the State to enforce them. There may be
"a federal exertion of authority which takes from a
"state the power to regular the duties of interstate
"carriers, or to provide remedies for their violation.
"This is realized by defendants in error and they as-
"sert that the State statute is in aid of commerce
"and not an interference with or a burden upon it,
"and therefore, must be sustained as a valid exer-
"cise of the State's power, citing Atlantic Coast
"Line R. Co. vs. Mazursky, 216 U. S. 122, 54 L. Ed.
"411, 30 Sup. Ct. Rep. 378; *Western U. Tel. Co. vs.*
"*James*, 162 U. S. 650, 40 Law Ed. 1105, 16 Sup. Ct.
"Rep. 934.

"In those cases and in later cases of *Western U.*
"*Tel. Co. vs. Commercial Mills Co.*, 218 U. S. 406, 54
"L. Ed. 1088, 31 Sup. Ct. Rep. 59, the principle is
"expressed that 'There are many occasions where
"the police power of the State can be properly exer-
"cised to insure a faithful and prompt performance
"of duty within the limits of the State upon the part
"of those engaged in interstate commerce.' Such
"exercise of power, it was further said, was in aid

"of commerce, and although incidentally affecting it, "did not burden it. But the facts of those cases dis- "tinguish from the case at bar, and make their prin- "ciple inapplicable. In the Tel. Company cases "there was a failure to transmit or deliver telegrams "in violation of the duty so to do imposed by the par- "ticular state statutes. In the railroad case, a "statute of the State of South Carolina which re- "quired carriers to settle within a specified time "claims for loss of or damage to freight while in "their possession within the State, was sustained "against the objection that it was an interference "with interstate commerce. In none of these cases, "however, was there any federal legislation upon the "subject involved and in all of them such circum- "stances was stated as an element of decision. The "circumstance is important and we are brought to "the inquire whether it exists in the present case.

"It is well settled that if the State and Congress "have a concurent power, that of the State is super- "seded when the power of Congress is exercised."

And again at page 261 of the opinion the Court says:

"And transportation means not only the physical "instrumentalities but all services in connection with "the receipt, delivery and handling of property "transported and such transportation the carrier "must 'provide and furnish upon reasonable request "therefor.' (Section 1 par. 2 of the act as amended "June 29th, 1906, by the Hepburn Act). Section 7 "of the latter Act requires the carrier to issue a bill "of lading for an interstate shipment, and makes the "carier liable for the loss of or damage to property "while on its own line and also while on the lines "over which the property may pass.

"There is scarcely a detail of regulation which is "omitted to secure the purpose to which the inter- "state commerce act is aimed. It is true that words "directly inhibitive of the exercise of state author- "ity are not employed, but the subject is taken pos- "session of. We are, therefore, brought to consider "what the statute of North Carolina provides."

And again in discussing the question of statutory enforcement under penalty of the common law duty to receive freight when tendered, as being neither an interference with, nor a burden on interstate commerce, but an aid thereof, the Court says:

"Their inducement and aim may be to secure a

"prompter performance of duty by the carrier, and "so far benefit. But that is not the question. The "question is, where is the control, in the state or con- "gress, and has congress acted? That the control "is in congress, we have seen; that it has acted, is "demonstrated by the provisions of the interstate "commerce act, to which we have referred.

"Manifestly, one authority must be paramount, "and when it speaks, the other must be silent. We "can see no middle ground. In so deciding, we take "no essential power from the states. The balances "of the constitution are only preserved, and there is "given to the states the power which is the States, "and to Congress the power which belong to Con- "gress.

"If a penalty of $50.00 for refusing to receive "freight, 'when tendered,' be no burden on inter- "state commerce beyond the power of a state to im- "pose, would a penalty of $100.00, or $1,000.00 like- "wise be no burden? May not the power which is "competent to impose a penalty select its amount?"

The decision further holds that Congress has taken full possession of this subject, and held the North Carolina statute which undertook to penalize the enforcement of a common law duty, in conflict therewith and void. The reasoning of this case it seems to us is decisive of the question in the case at bar.

In the case of *M. K. & T. R. Co. vs. Harriman Bros.*, 227 U. S. 657, the Court had before it for consideration the validity of the stipulation in the bill of lading which provides that no suit shall be brought after the lapse of ninety days, from the happening of any such loss or damage. The shipment was interstate. The State of Missouri, where the contract was made, and the state of Texas where the loss occurred and where the case was tried, had statutes declaring such a stipulation invalid and in conflict with the State laws giving a longer time within which to bring suit. The case was carried to the Supreme Court on a writ of error, and among other things it held (quoting from the syllabus):

"State laws declaring contracts invalid which re- "quire the bringing of an action against a carrier "for loss or damage to a shipment in less than the "statutory period were superseded, so far as inter- "state shipments are concerned, by the Carmack "Amendment of June 29th, 1906, to the Act of Feb- "ruary 4th, 1887, par. 20, which furnishes the ex-

"clusive rule on the subject of the liability of the car-
"rier under contracts for interstate shipment."

It is manifest from an examination of the recent dicisions of the Supreme Court that far reaching and radical changes have been brought about by the amendment of the Carmack amendment. These decisions demonstrate to an absolute certainty that Congress has preempted the field of interstate commerce, to the exclusion of all state regulation, legislation and policy. Any state legislation, regulation or policy affecting this, even remotely or indirectly, is void. It is not primarily a question of conflicting legislation between the State statutes and the Act of Congress, but the question is one of power. The decisions of the Supreme Court which we have quoted, state in terms that the act was intended to cover and regulate the entire subject of interstate commerce, leaving nothing to the states, even by way of legislation, policy or regulation. The State no longer has any right or power to pass any law affecting in any way interstate commerce. The South Carolina penalty statute is directly concerned with interstate commerce. This, we suppose, will be admitted without argument. We have shown that the decisions of this Court and of the Supreme Court of the State of South Carolina, upholding the act heretofore, prior to this legislation of Congress, did not question this proposition, but on the contrary, while admitting that it was a regulation of commerce and did affect commerce, held that it was not an unreasonable regulation and did not create a burden on interstate commerce; that it was an aid thereto, and that the purpose of the act was to expedite the prompt handling of interstate traffic. The Court regards the terms, "prompt payment of claim" and "prompt delivery" as having he same legal meaning and effect. There can, therefore, be no escape from the conclusion that this act is a regulation to a certain extent of interstate commerce, directly affects the question, and is a legislative declaration of the policy upon this subject. The act can only be sustained on the assumption that the state has the *inherent power* to legislate on the subject. If it has no power, the Act is a nullity. In the absence of legislation by Congress, the State did have the right and power to legislate within certain limitations. This was decided by the Court in the Charles case and others construing this penalty statute. But since those decisions, Congress has legislated upon the subject, and that legislation is supreme, and divests the State of any vestige of right or claim of power to legislate in any way whatsoever, either directly or remotely. As was said by the Court in the Croniger case, supra:

"Almost every detail of the subject is covered so

"completely that there can be no rational doubt but "that Congress intended to take possession of the "subject, and supersede all state regulation with ref- "erence to it."

In the case of *Southern Railway vs. Reid, supra,* the Court distinguishes one of these penalty cases, to-wit, *A. C. L. vs. Mazursky,* and very clearly points out that the only reason the act was upheld was due to the fact that Congress had not undertaken to occupy the field. In discussing the Mazursky case along with others, the Court said:

"In the railroad case a statute of the State of "South Carolina which required carriers to settle "within a specified time, claims for loss of or dam- "age to freight while in their possession within the "State, was sustained against the objection that it "was an interference with interstate commerce. In "none of the cases, however, was there any federal "legislation upon the subject involved, and in all of "them such circumstance was stated as an element "of decision."

The Court then clearly points out that subsequent to those decisions there has been legislation on the subject, and that since that time Congress has manifested its intention to take entire control of the subject.

In the very nature of things, this is supreme. There can be no division of this power or authority. The one is supreme and paramount and the other is subordinate. It is no answer to the argument to suggest that Congress has not in words legislated on this specific question; that is to say, that there is no Act of Congress in terms providing that a penalty cannot be imposed for failure to pay claims for loss or damage growing out of an interstate shipment. No inhibitive words are necessary if Congress has legislated. *Sou. Ry. vs. Reid.*

The Supreme Court has laid down the proposition in many cases unnecessary to cite, that a thing may be within the letter of the statute and not within its meaning, and within its meaning although not within its letter. That the intention of the law makers is the law, and a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. The application of this principle to the case at bar is decisive of the question, for certainly the penalty statute embraces the subject primarily and directly involved in the Act of Congress. The amendment of June 29th, 1906, was primarily intended by Congress to establish and fix the liability of carriers for loss or damage to property moving in interstate transportation. The penalty statute of South Carolina is founded on the rules and

regulations fixed by the decisions of the Supreme Court of the State of South Carolina and State statutes, for loss and damages while in transit. The penalty cannot be enforced without reference to the question of the carrier's liability for loss and damage, and this certainly was the one thing above all others that the Carmack amendment had in view. We, therefore, have state statutes and State decisions on this question of loss and damage, upon which rests primarily the penalty statute, and we find the same identical matter the subject of legislation on the part of Congress. How, then, can it be said that Congress has not legislated directly in reference to this matter?

In addition to the changes brought about by the Carmack Amendment, quite as far reaching and important changes have been made in reference to the question involved, by the Amendment of June 26th, 1906, to Section 1 of the Commerce Act, "the Hepburn Act; and by the Mann-Elkins Act of June 18th, 1910.

In the case of *Chicago, R. I. & P. R. Co. vs. Hardwick Farmers Elevator Company*, 226 U. S. 426, this Court had under consideration the validity of a statute of the State of Minnesota, known as the Reciprocal Demurrage Law, which among other things made it the duty of the Railroad Company on demand by the shipper, to furnish cars for transportation of freight at terminal points on its line of road in Minnesota, imposing a penalty for failure to comply. In discussing the scope and effect of the Amendment of June 26th, 1906, to Section 1 of the Commerce Act, the Court by Mr. Chief Justice White said:

> "By the Hepburn act it was declared that the term
> " 'transportation
> " 'shall include cars and other vehicles and all in-
> "strumentalities and facilities of shipment or car-
> "riage, irrespective of ownership, or of any contract,
> "express or implied, for the use thereof, and all ser-
> "vices in connection with the receipt, delivery, ele-
> "vation and transfer in transit, ventilation, refriger-
> "ation or icing, storage and handling of property
> "transported; *and it shall be the duty of every car-*
> *"rier subject to the provisions of this act to provide*
> *"and furnish such transportation upon reasonable*
> *"request therefor,* and to establish through routes
> "and just and reasonable rates applicable thereto.'
> (Italics ours).
>
> "The purpose of Congress to specifically impose a
> "duty upon a carrier in respect to the furnishing of
> "cars for interstate traffic is, of course, by these pro-

"visions clearly declared. That Congress was spe-
"cifically concerning itself with that subject is fur-
"ther shown by a proviso inserted to supplement sec-
"tion 1 of the original act, imposing the duty under
"certain circumstances to furnish switch connections
"for interstate traffic, whereby it is specifically de-
"clared that the common carrier making such con-
"nections 'shall furnish cars for the movement of
"such traffic to the best of its ability, without dis-
"criminating in favor of or against any shipper.'
"Not only is there then a specific duty imposed to
"furnish cars for interstate traffic upon reasonable
"request therefor, but other applicable sections of
"the act to regulate commerce give remedies for the
"violation of that duty. Thus, by section 8 it is pro-
"vided 'that in case any common carrier, subject to
"the provisions of this act . . . . . shall omit to do
"any act, matter or thing in this act required to be
"done, such common carrier shall be liable to the
"person or persons injured thereby for the full
"amount of damages sustained in consequence of any
"such violation of the provisions of this act, together
"with a reasonable counsel or attorney's fee, to be
"fixed by the court in every case of recovery, which
"attorney's fee shall be taxed and collected as part
"of the costs in the case.' Further by section 9 an
"election is given to either make complaint to the
"Interstate Commerce Commission, or to bring, in a
"designated court, an action for the recovery of dam-
"ages; and by section 10, it is made a criminal of-
"fense for an employee of a corporation carrier to
" 'wilfully omit or fail to do any act, matter or thing
"in this Act required to be done.'

"As legislation concerning the delivery of cars for
"the carriage of interstate traffic was clearly a mat-
"ter of interstate commerce, even if such subject was
"embraced within that class of powers concerning
"which the state had a right to exert its authority in
"the absence of legislation by Congress, it must fol-
"low, in consequence of the action of Congress to
"which we have referred, that the power of the State
"over the subject-matter ceased to exist from the
"moment that Congress exerted its paramount and
"all-embracing authority over the subject. We say
"this, because the elementary and long settled doc-
"trine is that there can be no divided authority over
"interstate commerce, and that the regulations of
"Congress on the subject are supreme. It results,

"therefore, that in a case where from the particular "nature of certain subjects the state may exert au- "thority until Congress acts, under the assumption "that Congress, by inaction, has tacitly authorized "it to do so, action by Congress destroys the possibil- "ity of such assumption, since such action, when as- "serted, covers the whole field, and renders the state "impotent to deal with a subject over which it has no "inherent, but only permissive, power. *Southern "R. Co vs. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 "Sup. Ct. Rep. 140."

In the case of *St. Louis, I. M. and S. R. Co. vs. Edwards*, 227 U. S. 265, the Court had under consideration an Arkansas statute which required Railroad Companies to give notice by mail or otherwise to consignee, of the arrival of shipment, together with the weight and amount of freight charges due thereon, providing a penalty for its failure so to do after the expiration of twenty-four hours after the arrival of the shipment at destination. The Court among other things held:

"As applied to interstate commerce, however, we "think such penalties were not enforcible because of "a want of power in the State to impose them, in "view of the legislation of congress existing at the "time of the alleged duty to give notice arose.

"While the case before us concerns the power of "a state over the delivery of cars in consummation of "an interstate shipment, we nevertheless think that "the Hardwick case is controlling because the legis- "lation of Congress as celarly excludes the right of "a state to penalize for failure to deliver interstate "freight at the termination of an interstate shipment "as it was found to prevent a State from penalizing "for failure to furnish cars for the initiation of the "movement of interstate traffic. This conclusion is "necessary since the amendment to par. 1 of the act "to regulate commerce, by which a definition is given "to the term 'transportation,' and which in the Hard- "wick case was held to exclude the right of a state "to penalize for the non-delivery of the cars to ini- "tiate the movement of an interstate shipment, by "its very terms embraces the obligation of a car- "rier to deliver to the consignee, and, therefore, by "the same token excludes the right of a state to pen- "alize on that subject."

The decision further holds:

"That the act of Congress not only excludes the "right of a state to regulate by penalties or demur-

"rage charges, the obligation of furnishing the means
"of interstate transportation, but also excludes
"power in a state to impose penalties as a means of
"compelling the performance of the duty to promptly
"deliver in consummation of such transportation."

The Amendment of 1910 to Section 1 of the Commerce Act makes it the duty of all carriers subject to the provisions of the Act, to establish, observe and enforce reasonable rules and regulations for the classification of property, etc., etc., and the facilities for transportation, etc., etc., *and all other matters relating to or connected with the receiving, handling transporting, storing, or delivery of property subject to the provisions of the Act, which may be necessary or proper to secure the safe and prompt receipt, handling and delivery of property subject to the provisions of this Act, upon just and reasonable terms, etc., etc.* (Italics ours).

It would certainly seem that the Act of commerce as it now stands and as it was at the time the cause of action in this case arose, is sufficiently broad to manifest the intention of Congress to take entire charge of this subject. It has legislated on almost every phase of the question. It must certainly be assumed that by these enactments Congress has abundantly manifested its intention to exercise in reference to this subject its paramount authority and to the exclusion of the legislation in reference thereto by the several States The character of the subject is such as to absolutely require uniformity. It is national in scope and importance, and in the very nature of things cannot be the subject of a division of power. Congress has not only clearly manifested its intention to assume the control and regulation thereof, but the amendment referred to above imposes on the carrier in the most explicit terms the duty of making safe and prompt transportation and delivery of the property intrusted to it for carriage.

The South Carolina Penalty Statute has been held to have in view this identical purpose. The claim is that it aids transportation by enforcing prompt delivery and safe carriage under the threat of a penalty for its failure so to do. The Act of Congress in words and terms makes this the subject of legislation. It makes it the duty of the carrier to adopt such rules and regulations as would bring about this purpose, and provides that it make adequate redress to the party injured for a failure on the part of the carrier to comply with the mandate of Congress. In view of this, where is there any room for the South Carolina Penalty Statute, to undertake to regulate this same subject and enforce by penalty its performance? It is quite true that Congress, as pointed out in

this decision by the Supreme Court of South Carolina has not said in words that the Penalty Statute of South Carolina is void, but it has occupied this field and has assumed to legislate in reference to this subject, and the assertion my Congress of its power instantly nullifies action by the State.

In the very recent case of *Southern Railway Company vs. The Railroad Commission of Indiana* decided February 23rd, 1915 this Court had before it a Statute of the State of Indiana which required railroad companies to place secure grab-irons and hand-holds on the sides or ends of every railroad car, under a penalty of One Hundred ($100.00) Dollars fine to be recovered in a civil action.

The railroad company took the position that the subject matter of the Indiana Statute was covered by the Federal Safety Appliance Act of February 24th, 1910. We quote as follows from the decision:

> "But so far as it did legislate, the exclusive effect "of the Safety Appliance Act did not relate merely "to details of the statute and the penalties it impos- "ed, but extended to the whole subject of equipping "cars with appliances intended for the protection of "employees. The states thereafter could not legis- "late so as to require greater or less or different "equipment; nor could they punish by imposing "greater or less or different penalties. For as said "in *Prigg vs. Commonwealth* of Pennsylvania, 16 "Pet. 618: 'If Congress have a constitutional power "to regulate a particular subject, and they do actual- "ly regulate it in a given manner, and in a certain "form, it cannot be that the state legislatures have a "right to interfere; and, as it were, by the way of "complement to the legislation of Congress, to pre- "scribe additional regulations, and what they may "deem auxiliary provisions for the same purpose. "In such a case, the legislation of Congress, in what "it does prescribe, manifestly indicates that it does "not intend that there shall be any farther legisla- "tion to act upon the subject-matter. Its silence as "to what it does not do, is as expressive of what its "intention is as the direct provisions made by it.... "the will of Congress upon the whole subject is as "clearly established by what it had not declared, as "by what it has expressed."

The Supreme Court of South Carolina in the case at bar places its decision on the ground that there is no real conflict between the South Carolina statute and the Act of Congress as amended. In the case of *Southern Railway vs. Rail-*

road Com. of Ind., supra, it is demonstrated that this is not the true test. It is not essential that there should be an actual conflict in the matter of mere details. If Congress has assumed to legislate on the general subject-matter it is exclusive and preempts the entire field. We quote in support of this proposition again from the case of Southern Railway, *supra:*

> "In *St. L., Iron Mt. & S. Ry. vs. Hampton,* 227 U. "S. 267, it was held that the Arkansas statute impos- 'ing a penalty for failing to deliver cars had been su- "perseded by the provisions of the Hepburn Act, al- "though the provisions of the two setatutes were not "identical. In *Northern Pacific Ry. vs. Washing- "ton,* 222 U. S. 371, it was held that Congressional "legislation as to hours-of-service so completely oc- "cupied the field as to prevent state legislation on "that subject. In *Erie R. R. vs. New York,* 233 U. "S. 671, a like ruling was made in a case where "the New York law punished a Railroad Company "for allowing an employee to work more than eight "hours when the Federal Statute punished the Com- "pany for employing him for more than nine hours "—even though it was argued that the state legisla- "tion was not in conflict with the Federal Act, but "rather in aid of it. The same contention is made "here in as much as the Indiana law requires hand- "holds on both sides or ends of cars, while the Fed- "eral statute requires hand-holds to be placed both "on the sides and ends of cars.
>
> "The test, however, is not whether the state legis- "lation is in conflict with the details of the Federal "law or supplements it, but whether the State had "any jurisdiction of a subject over which Congress "had exerted its exclusive control."

In the case of *Chicago R. I. & P. Ry. Co. vs. Cramer,* 232 U. S., 490 this Court held that the effect of the Carmack Amendment was to establish a uniform rule of liability in Interstate Commerce.

In the case of *Atchinson T. N. & S. F. Ry. Co. vs. Robinson,* 233 U. S., 173 the Court in speaking of the effect of the Carmack Amendment at page 180 of the decision has this to say:

> "That the effect of the Carmack amendment to the "Hepburn Act (* 30, act of June 29, 1906, 34 Stat. "at L. 584, chap. 3591, U. S. Comp. Stat. Supp. "1911, p. 1288) was to give to the Federal jurisdic- "tion control over interstate commerce, and to make "supreme the Federal legislation regulating liability

"for property transported by common carriers in in-
"terstate commerce, has been so recently and repeat-
"edly decided in this court as to require now little
"more than a reference to some of the cases. *Kansas*
"*City Southern R. Co. vs. Carl*, 227 U. S. 639, 57 L.
Ed. 683, 33 Sup. Ct. Rep. 397; *Chicago R. I. & P. R.*
"*Co. vs. Cramer*, 232 U. 58 L. Ed."

In the Reid Case, the Court, by Mr. Justice McKenna, very clearly stated:

"There is scarcely a detail of regulation which is
"omitted, to secure the purpose to which the inter-
"state commerce act is aimed. It is true that words
"directly inhibitive of the exercise of state authority
"are not employed, but the subject is taken posses-
"sion of."

In the case of *Fornel vs. Florida East Coast Ry. Co.*, 61 Sou. Rep. 194, the Supreme Court of the State of Florida held that an act of the State of Florida allowing interest and attorney's fees under the provisions of the said act, was superseded and annulled by virtue of the Carmack Amendment, holding that the federal legislation on the subject voided the state statute. The Florida Court in its decision points out that the Mazursky case was not now applicable for the reason that since that decision Congress has legislated on the subject involved. (See page 197 of the decision).

The Supreme Court of South Carolina takes the position that the Carmack Amendment has in no wise changed the law of carrier liability as applied to the delivering carrier, but that it has reference only to the initial carrier; that the law of the State as contained in the State decisions and State statutes is still of force, in so far as the delivering carrier is concerned, and is in no wise changed or modified by the recent Acts of Congress referred to herein.

See the case of *Meetze vs. Express Co.*, 91 S. C. 380.

In the case of *Eastover Mule and Horse Company vs. Atlantic Coast Line Railroad Company*, dedided at the April, 1914, Term of the Supreme Court of South Carolina, 99 S. C., page 457, the Court had before it a case to recover damages to a carload of livestock. The shipment was interstate, moving over several lines from without the State of South Carolina to a point within South Carolina. There was no proof as to where the damage occurred. The plaintiff recovered a verdict on the theory that the terminal carrier having delivered the property in a damaged condition, was presumed in law to have occasioned the damage, although there was nothing to indicate how or where the damage occurred. In its de-

cision the Court among other things held, in speaking of the Carmack Amendment:

"So the Statute was aimed at initial and not at ter-
"minal carriers." * * * * * * * * * *

"In every logical inquiry presumption often takes
"the place of proof. So in the case at bar; the last
"man who handles a package is presumed to have
"damaged it, if it be damaged; for if he did not
"damage it, he above all others knows it.

"The language of the Supreme Court of the
"Nation, making the initial carrier liable, is appli-
"cable also to the terminal carrier. 'The carrier and
"its agents, having received possession of the goods,
"were charged with the duty of delivering them, or
"explaining why that has not been done. This must
"be so, because carriers not only have means, but
"often the only means of making such proof.
"*Galveston vs. Wallace*, 223 U. S. 492.

"So here, where live stock was received by appel-
"lant from the L. & N. Railway Company, the appel-
"lant know if they were in good or bad condition;
"and they and the L. & N. R. R. Co. *alone* knew the
"fact. The presumption is that the appellant would
"not have recieved the car, had the contents been in
"bed condition; or, if it did so recieve the car, it
"would have made some notation and protest of the
"condition of the stock; and proof that it did not the
"damage would exempt it from liability.

"Upon that issue, the appellant called no witnesses.
"It may be assumed therefore that the appellant
did the damage to the stock.

"In our opinion the Cormack Amendment has not
"modified the law as declared in *Willet vs R. R.*, 66
"S. C. 478.

"Nor is there any intimation in *Dupre vs. Sea-
"board Air Line R. R. Co.*, 80 S. E. Rep. 710, that the
"consignee must prove damage by the terminal car-
"rier."

The case of *Galveston vs. Wellace, supra*, referred to by the Supreme Court of South Carolina, in the Eastover Case, was an action against the initial carrier for failure to deliver certain property shipped from a point in Texas to Lowell, Mass. The Railway Company contented that the Carmack Amendment did not apply, unless it appeared that the injury was caused by *negligence* of one of the carriers, and that since this did not appear by proof, the Act had no application, and undertook to defeat recovery by applying the terms of

the contract of shipment. There was no plea; and the Company did not offer to prove; that the non-delivery of the goods was due to causes other than its negligence, and for which it might in a proper case have been exempt from liability, to-wit, the act of God, or the public enemy, etc. It was in reference to this phase of the question that the language of this Court, quoted in South Carolina case, was used. It was not we respectfully submit intended to announce the doctrine that delivery in a damaged condition raised a presumption against the terminal carrier, but on the contrary announced the doctrine that this presumption arises against the initial carrier by reason of the terms of the Carmack Amendment which gives the right of action in a through shipment, against the initial carrier. The decision states that the shipment must be treated as having moved over the line of a single railroad, with the point of origin and the point of destination on the same line; and that the presumptions, pleading and practice would be such as would apply to a shipment on a single line of road; that on this issue the burden of proof was on the carrier to show that the loss resulted from some cause which would exempt the carrier, and that having recieved the goods, it was of course charged with the duty of delivering them, of explaining why it was not done.

It seems to us that the decision, instead of supporting the doctrine of South Carolina case, is strongly in our favor, in fixing this presumption, resorted to by the South Carolina Court, on the initial, rather than the intermediate or terminal, carrier, and that indicates clearly the purpose of Congress to preempt the field.

In the case of *Willet vs. Southern Railway Company*, 66 S. C. 477, the Supreme Court of the State of South Carolina, held that the general rule was to the effect that the burden is on the delivering carrier to respond to any damage which occurs in transit, or to show that it was done by some other carrier. The decision points out that the rule had never been under judicial discussion in South Carolina prior to the date of this decision. The Court held that public policy made it necessary to adopt this rule. We quote from the decision on this point as follows:

> "We think this doctrine is supported by public "policy so important as to amount to necessity. With "the immense traffic and the resulting complicated business methods of modern American railroads, and "the connection of these roads with one another, to "impose upon the owner of property passing over "connecting lines the burden of making affirmative "proof that the loss occured on a certain one of these

"lines, would be practically relieving of liability rail-
"roads handling freight as connecting lines; for the
"owner could rarely make the required proof, and
"when he could make it, in most instances the expense
"of doing so would be greater than the value of the
"goods. The rule works no hardship to the rail-
"roads as comon carriers, because they receipt to
"one another, and can easily trace loss or damage."

Since the enactment by Congress of the Carmack Amendment, there is no necessity for such a rule, and the public policy of this State, as outlined in this decision, is in conflict with the terms of the Carmack Amendment, as construed by this Court. The Carmack Amendment absolutely and certainly fixes this liability on the initial road, and it is not now necessary to resort to any presumptions or inference to maintain a suit to recover for loss or damage, where the shipment is interstate and passes through several lines. There is a fixed liability for this on the initial road, and to suggest that the policy of the State of South Carolina is still in force, in spite of the Carmack Amendment, would be equivalent to saying that the Act of Congress was not supreme, that the State decisions outlining the State's policy on this question of loss or damage could still stand, in spite of the fact that the Congress of the United States has assumed control and has outlined a different policy and different rules or regulations. It would permit such diversity of legislation and diversity of judicial holdings as to make it practically impossible for a carrier engaged in interstate commerce to even guess at its responsibility as to goods delivered to it for transportation from one State to another.

In the decision in the case of *Adams Express Company vs. Croninger*, 226 U. S. 491, this Court pointed out that to bring about uniformity in matters of this kind was one of the main reasons for the enactment of the Carmack Amendment.

In the instant case, there is no testimony to show the condition of the goods when first received by the initial carrier. The damage claimed was of a trifling nature, to-wit, Three Tops split, one Bed broken, and one Wash Stand Base and Leg broken. (R. 7.). There was nothing to show or indicate that this condition did not exist when the goods were received for shipment at High Point by the initial carrier. The Court, therefore, must indulge the further presumption, and assume that when reecived the goods were in perfect condition, and follow this up by the further presumption that the damage was occasioned by the delivering carrier, because delivered in that condition.

It is true that in the Willet case the Court held that where

goods are received in unbroken cases, with no damage disclosed by external inspection, there is, in such a case, no presumption that they were received in good condition. But where external inspection will disclose the nature of the goods and indicate whether damaged or not, then the decision does announce by implication that there is a presumption that they were received in good condition.

This decision in the Willet case and the policy outlined by the decision, has been reaffirmed and followed by the State Supreme Court and is applied in all cases against the delivering carrier for loss or damage.

In the Eastover Mule Case, supra, the decision points out that the Carmack Amendment has not changed the law as declared in the Willet Case, and refers to the case of *Dupre vs. Seaboard Air Line*, 98 S. C. ...., as authority for the position that it is not necessary for the consignee to prove damage by the delivering carrier. In view of the decision in the instant case, in the Meetze Case, in the Dupre Case, and in the Eastover Mule Case, all filed within a comparatively recent time, there can be no escape from the conclusion that the Supreme Court of the State of South Carolina has re-adopted and adhered to its policies on this subject of loss or damage which obtained prior to the Carmack Amendment, and has further decided that no change or modification whatever has been made in the laws of the State on this question of loss or damage, by the Carmack Amendment and other recent Amendments of the Commerce Act, as to the terminal carrier.

The effect of the decisions is to place liability for loss or damage, plus the penalty, on the delivering carrier, although as a matter of fact it may not have been the carrier which caused the damage. There can be no possible escape from this conclusion, because the decisions of the Court demonstrate that such has been the holding of the Court and such is the practical results of the decisions.

In other words, that the Carmack Amendment, as applied by our Court, has reference only to the liability of the initial carrier, and does not include within its terms the liability of the delivering carrier for loss or damage.

We submit, with all deference to the State Court, that this construction is directly in conflict with the terms of the Act and the construction placed on it by this Court.

We submit, further, that the Commerce Act of Congress as now amended, is exclusive of all State legislation, regulation or policy, as applied to interstate shipments, on the question of loss or damage, and the penalty statute is no longer of force.

The Interstate Commerce Commission has assumed to reg-

ulate the matter of the payment of claims for loss or damage and over charge in freight. For instance, on April 25th, 1914, Conference Ruling 462 of the Interstante Commerce Commission, held that the carrier must investigate before paying claims, that it could not absolve itself from responsibility in paying a claim by accepting the authority of a connecting line, but must act for itself and allow it or not on its own investigation and that the investigation so made must be thorough and disclose a lawful basis for the payment of the claim. It is impossible to complete this investigation within the time allowed by the South Carolina Penalty Statute, to-wit, forty days, but apart from the question of time, this ruling shows that the Commission has assumed control of the subject.

On May 29, 1914, the Commission further held, Conference Ruling 464, that the claimant is entitled to interest on an overcharge at the rate of 6 per cent from the date of the improper collection of the carrier, and that further, when the refund was made within thirty days after the improper collection of the over-charge, or within thirty days after presentation of claims involving questions of weight or classification, it may be considered as a cash transaction and not interest bearing.

In South Carolina the legal rate of interest is 7 per cent and claims of this character carry interest at 7 per cent from the date claim is filed.

The Commission has further approved the standard bill of lading which requires among other things that suit shall be brought within ninety days, to recover for loss or damage. This provision has been upheld by this Court in the Case of *M. K. & T. Ry. Co. vs. Harriman, supra.* The South Carolina Statute allows six years in which to bring claims of this kind and if a claim is filed after the lapse of ninety days and within forty days before six years expire, the plaintiff is entitled to a penalty, in addition to the amount of the claim, if the amount is found to be correct by the jury. We have here a direct conflict between the regulations of the Commerce Commission and the South Carolina Statute, to-wit, the payment of claims for loss or damage. The cause of action given by the penalty Statute is, of course, construed in connection with the other Statutes of South Carolina and read into the Statute as a part of it; that is to say, the Statute of Limitation within which the action may be brought is read into the South Carolina Penalty Statute, as a part of it.

The Commerce Act allows only two years within which to bring suit against a connecting Carrier by the crarier making payment, for re-imbursemen. Whereas, under the South Carolina Statute the claimant has six years within which to present his claim and may not make a claim against the de-

livering carrier until after two years, when it is too late to collect from the connecting line on account of the two years limitation fixed by the Commerce Act. This shows a further conflict between the two Statutes. There is no possible chance of ever collecting the penalty against the connecting line, which, in every case is an entire loss to the delivering road.

The South Carolina Penalty Statute applies to Express Companies as well as other carriers. The Interstate Commerce Commission, by Rule 9 of Express Classification 22, provides as follows:

> "In the event of a claim being made in writing, "the Company shall immediately acknowledge its re- "ceipt, and shall within six months from the date "thereof notify the claimant in writing of the dispo- "sition made thereof. Claims for personal loss or "damage shall be given equally prompt disposition."

The North Carolina Court in a very recent case, *Morphis vs. Southern Express Company,* declared a statute of that State imposing a Fifty Dollar penalty for failure to pay claims for loss or damage, and very similar to the South Carolina Penalty Statute, void as applied to an interstate shipment.

The North Carolina Statute had been upheld by the State Court prior to the regulation of the subject by Congress or the Interstate Commerce Commission, on the authority of the Mazursky case, but as the Court clearly points out in the Morphis decision, action by Congress or by the Commission had the effect of nullifying the State statute.

It would not clarify the situation to hold that the Statute in South Carolina was void as to Express Companies by reason of Rule 9 of Express Classification 22, and still of force as to railroad companies; particularly so in view of the conference rulings of the Commission on the identical subject involved, when as a matter of fact it is more difficult to investigate a claim for loss or damage or overcharge of freight than it is to investigate for loss or damage to an express package. The Commission has further held that the carrier must not pay a claim immediately on presentation and without investigation. See Conference Ruling 236, where the Commission held, among other things that the fact that the shipper may give bond to secure the repayment, if, upon further investigation, the claim proved to have been improperly adjusted, would not justify the carrier in paying the claim until after a proper investigation. It is true that the Commission has not in term stated what is the reasonable time. In other words, there is no inhibition against paying the claim within forty days provided forty days is sufficient in which to make the investiga-

tion required by the Commission. It is not necessary to show inhibiting regulation by the Commission. It is entirely sufficient to show that the Commission has assumed to regulate the subject, and its regulation under the power given by the Commerce Act nullifies any attempted regulation thereof by the State. This proposition is conceded by the decision of the court in the instant case, but the court, it is respectfully submitted, overlooked the fact that the matter had been the subject of regulation by the Commission in the particulars mentioned.

We have already called attention to the fact that the South Carolina Penalty Statute has been the subject of recent amendments and among others we now wish to call especial attention to the amendment which imposes the penalty for failure to pay a claim for freight "overcharge." In the instant case a claim was filed consisting of two items, one for loss and damage to the property and one for freight overcharge of $4.60—see Record, page 3. In the summons both items were included and judgment was asked for the consolidated amount for damage sustained plus the freight overcharge together with a penalty of $50.00 for failure to pay the claim made up of these two items—Record, page 1 and 2. The judgment of the Magistrate was for the full amount including the item of $4.60 overcharge and the penalty of $50.00 for failure to pay same.

Congress has ceratinly made this matter of freight overcharge the subject of full and specific legislation. In and by Section 2 of the Act to Regulate Commerce it is, among other things, provided:

> "That if any common carrier subject to the pro-
> "visions of this Act shall, directly or indirectly, by
> "any special rate, rebate, drawback, or other device,
> "charge, demand, collect or receive from any per-
> "son or persons a greater or less compensation for
> "any service rendered or to be rendered, in the trans-
> "portation of passengers or property, subject to the
> "provisions of this Act, than it charges, demands,
> "collects, or receives from any other person or per-
> "sons for doing for him or them a like kind of traffic
> "under substantially similar circumstances and con-
> "ditions such common carrier shall be deemed guilty
> "of unjust discrimination, which is hereby prohibited
> "and declared to be unlawful."

Further sections are directed against unjust and unreasonable preferences or advantages. The entire scope of the statute, as it has been construed by the United States Courts, instead of discriminating against parties, put all parties upon

the same basis and equality in matters of interstate transportation. To carry out this purpose, the Act, by Section 6 provides:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all rates, fares, and charges for transportation between different points on the route and between points on its own route and between points on its own route and the points on the route of any other carrier by railroad, to pipe line, etc.

Section 8 of the said Act provides:

> "That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done by any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the Court in every case of the recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

And, by Section 9, it further provides:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of the said remedies and must in each case elect which one of the two methods of proceedure herein provided for he or they will adopt. In any such action brought for the recovery of damages, the Court before which the same shall be mending may * * *

The Court will notice that the filing of the rate and schedule, required by Section 6, with the Interstate Commerce Commission does not preclude the shipper from seeking to have it declared unreasonable and discriminatory and reparation demanded, yet if the claim which is made is an *overcharge*—

that is a rate demanded by the carrier in excess of that which is filed with the Interstate Commerce Commission, such claim is unlawful and denounced by the Act, and the remedy is prescribed in Section 9 of the said Act.

In Barnes on Interstate Transportation, page 609, Section 408 it is said:

> "Overcharge on shipments may accrue in two ways
> "i. e., by the assessment of an excessive rate, or due
> "to error in weighing the shipment."

And from the same authority, page 605, Section 405—it is said:

> "The Commission has authority to award reparation for unjust charges on shipments due to error in "weighing."

In the case of *Lansing-Harris Coal & Grain Co. vs. St. L. & S. F. R. Co.*, 15, I. C. C. R., 37, the Commission, per Knapp, Chairman, stated:

> "Whether the Commission has authority to award "damages in a case where a carrier collects a greater sum on an interstate shipment than is fixed by its "published tariffs, or whatever the shipper must "seek his remedy in the Courts, presents a question "somewhat more difficult. But upon consideration "of the various provisions of the Act, it is believed "that the question should be resolved in favor of "the Commisioner's authority to make such an order. "The Commission is authorized to award reparation "to any person or persons found to be damaged by "any common carrier subject to the provisions of the "Act, for a violation thereof. One of the leading "prohibitions of the Act is that against the exaction "of an unreasonable rate, and it is well settled that "the Commission has authority to award reparation "in case of the exaction of an unreasonable rate. "As against the carrier its published tariff rate is "conclusive of the fact that any higher rate is unreasonable. It seems fairly certain that in case of "the exaction of a rate higher than the published tariff the shipper may bring suit in Court in the first "instance, but the Act also appears to give the Commission and the Courts concurrent jurisdiction in "this respect."

It, therefore, clearly appears by reference to the Act to regulate Commerce that Congress has in no uncertain terms legislated on the question of *freight overcharge*, and further that the Interstate Commerce Commission under and by virtue of the powers granted to it by the Act of Congress has

specifically made this matter the subject of regulation and decision. It was certainly the intention of Congress to cover this field to the entire exclusion of State legislation and to assume and to give the Commerce Commission and the Federal Courts jurisdiction of this question. This fact alone we respectfully submit, makes it necessary to reverse the judgment of the State Court.

The trial Court considered this item of freight overcharge as a part of the claim as filed and the same consideration was given it by the Supreme Court in its decision. There was no attempt to separate the matter of freight over-charge from the question of loss and damage to property and the penalty of $50.00 was allowed against the carrier by reason of its failure to pay the claim *including the item for freight overcharge.* In fact, there is no way under the Act to separate these items and no attempt to do so has ever been made by the Court in construing the Statute. If in the instant case they had been separated the penalty would not have attached under the terms of he Act which requires judgment for the full amount of the claim as filed.

We, therefore, in conclusion respectfully submit that in view of the amendments to the Commerce Act referred to herein covering the identical subject involved in the South Carolina Penalty Statute, and in view of the regulation of the same subject by the Interstate Commerce Commission that all State legislation, rules and regulations on this subject are superseded and annulled.

F. B. Grier,
Attorney for Plaintiff in Error.

state law on the same subject cannot be sustained as a help to the Federal statute because it goes farther than Congress has seen fit to go.

A state statute which is a burden on interstate commerce is not saved by calling it an exercise of police power.

Section 2573, Code of 1912, of South Carolina, imposing a penalty on carriers for failure to settle, or adjust, claims within forty days is an unconstitutional burden on interstate commerce and is also in conflict with the provisions of the Act to Regulate Commerce, as amended by the act of June 29, 1906. (Carmack Amendment.)

Atlantic Coast Line v. *Mazursky*, 216 U. S. 122, distinguished, as that case was decided prior to the enactment of the Carmack Amendment.

98 S. Car. 63, reversed.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of certain provisions of the South Carolina Civil Code of 1912 imposing penalties on carriers for failure to pay claims within a specified period, are stated in the opinion.

Mr. F. B. Grier for plaintiff in error:

The South Carolina Penalty Act, as construed by the Supreme Court of the State, makes the delivering carrier responsible for the delicts of the connecting carrier, resulting in loss or damage, to the lawful holder of the bill of lading, in a through shipment, although it may not as a matter of fact be the carrier at fault. *Varnville Fur. Co.* v. *C. & W. C. Ry. Co.*, 98 S. Car. 63; *Willet* v. *Railway Co.*, 66 S. Car. 477; *Dupree* v. *C. N. & L. Ry. Co.*, 98 S. Car. 468; *Eastover Mule Co.* v. *Atl. Coast Line*, 99 S. Car. 457.

The subject of the Carmack Amendment is carrier liability for loss, damage or injury to property, caused by it, or by any connecting carrier to whom the property is delivered, or over whose line it may pass. It embraces the entire subject and covers every detail of carrier liability to the lawful holder of the bill of lading, which the receiving or initial carrier is required to issue. *River-*

side Mills v. *Atl. Coast Line*, 219 U. S. 186; *Express Co.* v. *Croniger*, 226 U. S. 491.

The subject of the statute is carrier liability for freight overcharge, or for loss or damage to property and baggage while in possession of such common carrier. The penalty is automatic and is imposed by the terms of the statute for a failure to pay the claim for loss or damage within the time specified by the act. It grows out of and is founded on carrier liability for loss or damage sustained by the lawful holder of the bill of lading which the act of Congress requires the carrier to issue. The subject-matter of the act as to the fundamental and only real question involved is identical with the subject-matter of the act of Congress. Civil Code 1912, §§ 2572, 2573.

The State has no inherent power to deal with this subject. Its power is permissive only and dependent upon non-action by Congress, and ceases to exist the moment that Congress asserts its paramount authority over the subject, which is of national scope and importance, and permitting of but one uniform system of regulations. *Mo., Kan. & Tex. Ry.* v. *Harris*, 234 U. S. 412; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Express Co.* v. *Croniger*, 226 U. S. 491; *Chicago, R. I. & P. Ry.* v. *Cramer*, 232 U. S. 490; *Atchison, T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173.

The statute was upheld on the theory that there was no Federal legislation on the subject involved. The decisions held that the penalty imposed was for a delict of duty pertaining to the business of a common carrier, and in so far as it affected interstate commerce was an aid thereto by its tendency to promote safe and prompt delivery of the goods, or, its legal equivalent, prompt settlement of proper claim for damages.

The cause of action in *Charles* v. *Atlantic Coast Line*, 78 S. Car. 36; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122, arose in 1905, and since then Congress has

legislated on the subject. Hepburn Act, June 26, 1906, and the Mann-Elkins Act, June 18, 1910.

The Hepburn Act has been construed by this court to deny to the State the power of enforcing by statutory penalties the duty of receiving and prompt delivery of property in consummation of interstate transportation. *St. Louis, I. M. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Southern Ry.* v. *Reid*, 222 U. S. 424.

The Interstate Commerce Commission, pursuant to the powers conferred on it by the Commerce Act, has assumed the regulation of the payment of claims for loss or damage and for overcharge of freight by carriers. Action by Congress or the Commission supersedes and annuls state regulation. *Northern Pac. Ry.* v. *Washington*, 222 U. S. 370; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Southern Ry.* v. *Reid & Beam*, 222 U. S. 444; Conference Ruling No. 462, April 25, 1914; No. 464, May 28, 1914; Conference Ruling No. 236.

Congress has legislated specifically with reference to freight overcharge, and the Interstate Commerce Commission under its delegated powers has assumd control of the subject. Sections 2, 8 and 9 of the act to regulate commerce. See Barnes Int. Transp., 600, § 405-D and p. 600, § 405-J; *Lanning-Harris Co.* v. *St. L. & S. F. Ry.*, 15 I. C. C. 37; *Leonard* v. *N. K. T. R.*, 12 I. C. C. 538.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for $14.75, damage to furniture in transit from High Point, North Carolina, to Varnville, South Carolina, $4.60 overcharge, and $50 penalty under

a South Carolina statute, Civil Code, 1912, § 2573, for a failure to pay the claims within forty days. The defendant contended that the law imposing the penalty was invalid under the Act to Regulate Commerce, especially § 20, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, 593, known as the Carmack Amendment. The lower courts gave judgment for the plaintiff and the judgment was affirmed by the Supreme Court of the State. *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122, was relied upon as still sustaining the law notwithstanding the amendments of the Federal act. 98 S. Car. 63.

The defendant (plaintiff in error), received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear. But by § 2572, in such cases the initial, intermediate, or terminal carrier who fails within forty days from notice to inform the notifying party when, where and by which carrier the property was damaged is made liable for the amount of the claim and a penalty of $50, although it may escape by proof that it used due diligence and was unable to trace the property, etc. By § 2573 a similar liability is imposed on carriers for failure to pay claims for freight overcharge or damage to property while in the possession of such carriers, 'within forty days in case of shipments from without the State, after the filing of such claim' &c. If the property never came into their possession they are remitted to § 2572. It seems to follow from the decision in this case, that the terminal carrier is held for a loss anywhere along the line and for the penalty, unless it proves that the property never came into its possession, &c., or succeeds in shifting the loss within the forty days allowed. Therefore the assumption of this court in *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122, 129, that the statute only concerned property lost or damaged while in the possession of a

carrier in South Carolina no longer is correct—perhaps because of amendments in what now is § 2572.

It is true that in the opinion of the Supreme Court the judgment is spoken of as being for damage done to a shipment 'while in defendant's possession in this State,' and it is said that the statute limits the liability to such damage. But in view of the record this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault. The defendant happened to be the last carrier of the line, and in many States, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed. But while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. *Willett* v. *Southern Ry.*, 66 S. Car. 477, 479. *Moore* v. *N. Y., New Haven & Hartford R. R.*, 173 Massachusetts, 335, 337. The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since with the limits that we have stated, it applies indifferently to any carrier in the line, if within the State, according to the accident of the plaintiff's demand. The case then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the State, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.

The claims dealt with in *Atlantic Coast Line Co.* v. *Mazursky*, 216 U. S. 122, all arose before June 29, 1906, the date of the Carmack Amendment. The South Carolina law has been amended and enlarged in scope since that decision but it is less necessary to scrutinize those changes

than to consider the modifications of the United States law. As it now stands that law requires the initial carrier to issue a through bill of lading and makes it liable for all damage anywhere on the route. § 20. By § 1 as amended by the act of June 18, 1910, § 7, c. 309, 36 Stat. 539, 546, it is made the duty of carriers to secure the safe transportation and delivery of property subject to the act, upon reasonable terms. As was said in *Missouri, Kans. & Tex. Ry. Co.* v. *Harris*, 234 U. S. 412, 420, the result of many recent cases, there cited, beginning with *Adams Express Co.* v. *Croninger*, 226 U. S. 491 and coming down through *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, is that 'the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded.' It is true that in that case the inclusion of the attorney's fee not exceeding $20 in the costs upon judgments for certain small claims was upheld although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental the ground relied upon was that the statute did not 'in anywise enlarge . . . the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the measure of recovery,' pp. 420, 422. The South Carolina Act, on the other hand extends the liability to losses on other roads in other jurisdictions and increases it by a fine difficult to escape. It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss. We leave on one side the remote analogies put forward in the decision of the state Court as in our opinion the cases and principle to which we have referred are sufficient and direct. We should add that the item for overcharges also falls under the act of Congress, § 2, as it now stands, since that section makes the receiving of greater compensation than is received from others for similar services an unjust and unlawful dis-